No. 90-270

In The

Supreme Court of the United States

October Term, 1990

SUSAN BRANDT, BOYD DOVER; LUCINDA BLAIR; ANDY HARCLERODE; SHERRY MEREDITH; LLOYD NOVICK; DOUGLAS X. PATINO AND DARWIN COX,

Petitioners,

v.

CHALKBOARD, INC.; KAREN M. HOYT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court below erred in denying qualified immunity to state officials, who, based on their finding that public health, safety and welfare demanded emergency action and relying on a state procedural statute, summarily suspended a for-profit corporation's day care license (with a hearing scheduled eight days later). More specifically:

(a) In light of *Davis v. Scherer*, 468 U.S. 183 (1984), did the court below err in holding that since the state officials had followed the wrong state procedural statute in effecting the summary suspension, qualified immunity was unavailable to them?

(b) Did the court below properly apply the test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), to conclude that a for-profit corporation is entitled to a pre-termination hearing prior to the suspension of its day care license?

(c) Did the court below err in holding that the state officials' emergency finding is always subject to post-hoc redetermination by the district court whenever the underlying facts are disputed? and

(d) Did the court below err in finding that the law governing federal procedural due process was "clearly established" in October of 1985 requiring that state officials must follow the "appropriate" state procedural statute in effecting a summary suspension and that the day care licensee should have been given a pretermination hearing under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985)?

LIST OF PARTIES

All the parties are listed in the caption of this case.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The Amended Opinion of the Court of Appeals for the Ninth Circuit filed May 11, 1990 is reported at 902 F.2d 1375 and reprinted in the Appendix here at pages A-1 through A-16, *infra*. The Court of Appeals' original opinion was filed on July 13, 1990. It is reported at 879 F.2d 668 and reprinted in the Appendix hereto at pages A-17 through A-30, *infra*. The District Court's order denying petitioners' motion for summary judgment based on their claim of qualified immunity is unreported. It is reproduced here in the Appendix at pages A-31 through A-33.

JURISDICTION

The original decision and opinion of the Court of Appeals were entered on July 13, 1989. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed on July 26, 1989. The Court of Appeals issued an amended opinion on May 11, 1990 and on that day it denied the Petition for Rehearing and Suggestion for Rehearing en Banc. This petition for writ of certiorari is filed on August 8, 1990, within ninety (90) days of May 11, 1990.

This Court has jurisdiction to review the judgment of the Court of Appeals for the Ninth Circuit under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The constitutional provisions and state statutes involved are set out verbatim at A-34 through A-35 in the Appendix. They are: United States Constitution, Fifth Amendment and Fourteenth Amendment Section One. Arizona Revised Statutes (A.R.S.) Sections 36-886.01 and 41-1064(c).

STATEMENT OF THE CASE

A. Facts and proceedings leading to the District Court action

Chalkboard, Inc. is an Arizona for-profit corporation licensed by the State of Arizona to conduct business as a day-care center for pre-school children. Approximately 85% of its enrollment was under contract with the State Department of Economic Security (DES), which was responsible for both the well-being of the children and the obligation to pay for the day-care services.

On October 10, 1985, the Tucson Police Department received a complaint from a mother that her young daughter, a pupil at Chalkboard, had been sexually molested by a teacher at the day-care center. The police notified the Office of Child Protective Services (CPS), a unit of DES, and Susan Brandt, a social worker for CPS, began an investigation. Two other investigators, Lucinda Blair and Sherry Meredith, who were employees for the Arizona Department of Health Services (DHS), joined in the investigation on the same day.

During the next several days the three investigators interviewed pupils and a former teacher at Chalkboard. They learned of other complaints of sexual molestation by the same teacher, and of numerous complaints of physical abuse involving other staff members. These included the disciplining of children by tying their hands behind their backs with sheets, tying them to cots, placing the children on a high shelf, and locking them in a shed or outside of the building. In the course of the investigation, the day-care center was also found to be over its licensed capacity – a violation for which Chalkboard was previously warned in 1983. Throughout the investigation Chalkboard was represented by counsel, and the state investigators and officials were advised by Beth Teply, an Arizona Assistant Attorney General, who was kept apprised of the facts as they developed.

On October 16, 1985, Boyd Dover, the Deputy Director of DHS, after reviewing the facts and consulting with the Arizona Attorney General's Office, ordered the summary suspension of Chalkboard's day-care license. He acted pursuant to Arizona Revised Statutes § 41-1064(C) (then denominated § 41-1012(C)). A.R.S. § 41-1064(C), which is reproduced in the Appendix, is a general statute which provides for summary suspensions in case of public health, safety or welfare emergencies. The statute had been previously used by DHS to summarily suspend day-care licenses on at least two other occasions, and Assistant Attorney General Teply had specifically advised DHS that the statute was applicable to Chalkboard. Dover made a finding that public health, safety or

welfare required emergency action,[1] suspended the license, and subsequently pursuant to § 41-1064(C) scheduled a full administrative hearing for Chalkboard to be held eight days later, on October 24, 1985.

On October 16, 1985, Chalkboard filed an injunction action in the state superior court, seeking to enjoin the summary suspension order. No preliminary injunction was issued although a hearing was scheduled for October 18, 1985. On October 18, 1985, Chalkboard requested and was granted leave to withdraw the state court action. On October 23, 1985, Chalkboard filed the instant civil rights action in the federal district court pursuant to 42 U.S.C. § 1983. Federal jurisdiction in the district court was based on 28 U.S.C. §§ 1331 and 1343(3). The suit sought only monetary damages from state officials. The following day, on October 24, 1985, Chalkboard's attorney appeared at the scheduled administrative hearing and requested a continuance until December of 1985. When the rescheduled administrative hearing was subsequently held on December 6, 1985, Chalkboard chose not to appear.

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[1] Although DHS was aware that Chalkboard had already suspended the teacher involved with the sexual molestation allegations, Chalkboard had not taken any disciplinary action against the staff members who were the subjects of the other physical abuse complaints. The numerosity, newness, and seriousness of these complaints, the fact that Chalkboard had completely failed to report them as required by state law, and the on-going overcapacity violation, all contributed to DHS' conclusion that the health, safety and welfare of the young children was at risk and that summary suspension was warranted.

B. Proceedings in the District Court

Chalkboard's § 1983 action in the District Court seeks monetary damages against the three investigators, their supervisors, Boyd Dover, the Deputy DHS Director who signed the summary suspension order, the Director of DHS, and the Director of DES. The complaint alleges violations of federal due process and equal protection rights.

In the early stage of the litigation, the District Court rejected the defendants' request for abstention and ruled that the state officials could not rely upon A.R.S. § 41-1064(C) as authority for the summary suspension of Chalkboard's license. Instead, the court ruled that the statute was preempted by another state statute, namely A.R.S. § 36-886.01.[2] Finally, notwithstanding the defendants' assertion of complete immunity defenses, the District Court ordered discovery to proceed and ruled that any motions for summary judgment would be deferred until after the completion of discovery.

At the conclusion of discovery, the defendants moved for summary judgment on both the merits of the due process claim and on grounds of immunity. Chalkboard cross-moved for summary judgment. The District Court denied both motions. In rejecting defendants' claims of absolute and qualified immunity, the court held that the issue of whether an emergency existed was a material

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[2] The District Court subsequently granted Chalkboard's motion to add a pendent state law claim despite the defendants' objection that *Pennhurst State School v. Halderman*, 465 U.S. 89 (1984) precluded such a pendent claim.

issue of fact to be tried to the court. The defendants timely appealed the denial of their immunity defense pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

C. Proceedings in the Court of Appeals

In the Court of Appeals, the defendants requested an order certifying to the Arizona Supreme Court the novel state law question of whether the two state statutes were in irreconcilable conflict, with § 36-886.01 totally pre-empting § 41-1064(C). The motion was denied. Subsequently, the Ninth Circuit handed down its initial opinion on July 13, 1989, affirming the District Court's decision. The decision is reported at 879 F.2d 668 (9th Cir. 1989).

The opinion relied upon *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), to hold that a for-profit day-care center was entitled to a pretermination hearing prior to the suspension of its business license. In a footnote, the court rejected the State's argument that the day-care center's license was analogous to other types of property interests that this Court held could be suspended without pretermination hearings. (A-27) 879 F.2d at 672, n.6. The Court also held that the law was clearly established and that absent a determination by the district court that an emergency existed, the defendants were not entitled to qualified immunity.

The defendants timely moved for rehearing and suggestion for rehearing en banc. They argued that the Court of Appeals had misconstrued certain material facts; that it should have certified the state law question to the Arizona Supreme Court; that it had misapplied state law as well as the controlling three-prong test laid down in

Mathews v. Eldridge, 424 U.S. 319 (1976); and that its decision was in conflict with the decisions of other courts, as well as its own prior decision in *Sorrano's Gasco v. Morgan*, 874 F.2d 1310 (1989).

On May 11, 1990 the Court of Appeals issued an amended opinion which corrected certain factual statements and reanalyzed the central due process issue. 902 F.2d 1375 (9th Cir. 1990). The new opinion attempted to apply the *Mathews* test: It first found Chalkboard's license interest to be high, comparing the corporate business license to a driver's license. It next found the risk of erroneous deprivation to be also high. Finally, the Court declined to independently assess the critical, third prong, i.e., the counterbalancing governmental considerations. Instead, the Court concluded that the Arizona legislature had foreclosed consideration of this interest by requiring (according to the Ninth Circuit's interpretation of conflicting state law) a state judicial proceeding prior to any suspension of a day care license.

After deciding the due process issue adversely to the State, the Ninth Circuit then considered and rejected the defendants' immunity defenses. It concluded that the right to a pretermination hearing and the state law "violation" were "clearly established" and held that the defendants therefore were not entitled to qualified immunity that they otherwise possessed. Simultaneously with the issuance of the amended opinion, the Court of Appeals denied the motion for rehearing and suggestion for rehearing en banc.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE COURT OF APPEALS' DECISION, USING A PURPORTED VIOLATION OF STATE PROCEDURAL LAW TO DEPRIVE STATE OFFICIALS OF THEIR QUALIFIED IMMUNITY, IS DIRECTLY CONTRARY TO THIS COURT'S DECISION IN *DAVIS V. SCHERER*, AS WELL AS THE LAW OF OTHER CIRCUITS.

A. The Ninth Circuit decision cannot be reconciled with *Davis v. Scherer*

In *Davis v. Scherer*, 468 U.S. 183 (1984), this Court squarely decided the issue of whether the violation of other state statute or regulation deprives state officials of their qualified immunity from damages in actions pursuant to 42 U.S.C. § 1983. This Court said:

> Appellee urges therefore that a defendant official's violation of a clear statute or regulation, although not itself the basis of suit, should deprive the official of qualified immunity from damages for violation of other statutory or constitutional provisions.
>
> On its face appellee's reasoning is not without some force. We decline, however, to adopt it. Even before Harlow, our cases had made clear that, under the "objective" component of the good faith immunity test, "an official would not be held liable in damages under § 1983 unless *the constitutional right he was alleged to have violated* was 'clearly established' at the time of the violation [citations omitted]. Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision. [Footnote omitted] 468 U.S. at 193-194 [emphasis in original].

This holding rests on simple, yet unassailable logic: To hold otherwise would allow *federal* due process rights to be enlarged or circumscribed by the vagaries of individual *state* legislatures. Indeed, it would negate the very concept of a federal right – which is precisely what the Ninth Circuit did in this case.

Davis v. Scherer cannot be distinguished from the instant action. Both cases are premised on an alleged violation of federal due process rights, with state defendants claiming qualified immunity. *Davis* dealt with the termination of employment; this case deals with the suspension of a business license. The employer in *Davis* was alleged to have violated Florida law in the termination proceeding; here the federal courts found that state officials followed the wrong Arizona statute in the suspension proceeding. Yet, contrary to the unequivocal holding in *Davis*, the Ninth Circuit concluded that the "violation" of state procedural law *did* create a federal due process violation and deprive the state defendants of their qualified immunity. In fact, without once mentioning *Davis v. Scherer*,[3] the court simply concluded:

> The state legislature had also made clear its specified procedures for dealing with emergencies potentially threatening the welfare of children in day-care centers. In ignoring these [state] procedures and summarily suspending Chalkboard's license without notice or an opportunity to respond, reasonable officials would have known that their actions were not lawful. It is not the rule that "an official action is

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[3] Which was cited by both parties in their briefs in the Ninth Circuit.

> protected by qualified immunity unless the very action in question has been previously been held unlawful . . . . " It is enough that "in light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. at 640; see *Wood v. Ostander*, 851 F.2d 1212, 1217 (9th Cir. 1988). (A-16) 902 F.2d at 1382, 1383.

The Ninth Circuit decision is in direct conflict with the dispositive language of *Davis v. Scherer* and the fundamental principle of federal jurisprudence that it represents. On this basis alone, the writ of certiorari should be granted and the Ninth Circuit decision summarily reversed.

B. The Ninth Circuit decision is also in conflict with the uniform law of other circuits

Not only is the Ninth Circuit decision in conflict with *Davis v. Scherer*, it is also in conflict with the law of all other circuits that have addressed the same issue of whether state or other ancillary law violations can deprive officials of their qualified immunity or create a cause of action under § 1983. For example, in stark contrast with the Ninth Circuit's analysis, the Second Circuit in *Robinson v. Via*, 821 F.2d 913 (2d Cir. 1987) stated:

> We reject the district court's view that Via and Harrison were not entitled to qualified immunity because their taking of the children violated some state statute – i.e. because the children assertedly were not in "immediate danger" within the meaning of 33 U.S.A. § 636(3) and were not taken to juvenile court as required under 33 U.S.A. § 640. First, even if the phrase "immediate danger" in the Vermont statute sets

> a standard different from the "emergency" standard under the due process clause as we have described it, a violation of state law neither gives Robinson a § 1983 claim nor deprives defendants of the defense of qualified immunity to a proper § 1983 claim. *See, e.g. Davis v. Scherer,* 468 U.S. 183, 194-196 (1984) [other Second Circuit citations omitted]. 821 F.2d at 922.

Accord Goyco de Maldonado v. Rivera, 849 F.2d 683 (1st Cir. 1988) (violation of Puerto Rico's Housing Bank's regulation does not deprive state official of qualified immunity); *Borucki v. Ryan,* 827 F.2d 836 (1st Cir. 1987) (violation of state law governing the release of court-ordered psychiatric reports does not result in the loss of defendants' qualified immunity); *Ricci v. Key Bancshares of Maine,* 768 F.2d 456 (1st Cir. 1985) (even if F.B.I. agents violated some other provisions of federal law governing national origin discrimination they do not lose their qualified immunity unless the violated law provides the basis for the cause of action sued upon); *Chinchello v. Fenton,* 805 F.2d 126 (3rd Cir. 1986) (violation of some other state or regulation does not forfeit qualified immunity unless that statute or regulation confers the very right of action on the plaintiff); *Brown v. Texas A. & M. University,* 804 F.2d 327 (5th Cir. 1986) (university's failure to follow its own internal pretermination procedures does not establish a federal due process violation); *Price v. Brittain,* 874 F.2d 252 (5th Cir. 1989) (violation of employees' handbook does not deprive employer of qualified immunity); *Gagne v. City of Galveston,* 805 F.2d 558 (5th Cir. 1986) cert. den. 483 U.S. 1021 (1987) (violation of regulation requiring removal of prisoner's belts does not deprive defendants of their qualified immunity); *Davis v. Holly,* 835 F.2d 1175 (6th Cir. 1987) (state mental hospital administrators

who may have been negligent under state law did not lose their immunity); *Kompare v. Stein*, 801 F.2d 883 (7th Cir. 1986) (violation of a county ordinance is not a violation of federal due process); *Gramenos v. Jewel Casualty Insurance*, 797 F.2d 432 (7th Cir. 1986) cert. den., 481 U.S. 1028 (1987) (any violation of state law in regard to the swearing of the complaint is not actionable under 42 U.S.C. § 1983); *Ginter v. Stallcup*, 869 F.2d 384 (8th Cir. 1989) (allegation that agents violated state arson law is irrelevant unless their behavior also violated a clearly established constitutional right); *Edwards v. Baer*, 863 F.2d 606 (8th Cir. 1988) (A police officer does not lose his qualified immunity by violating police department guidelines); *Edwards v. Gilbert*, 867 F.2d 1271 (11th Cir. 1989) (violation of state laws and regulations on housing of juveniles does not deprive defendants of qualified immunity); and *Childress v. Small Business Administration*, 825 F.2d 1550 (11th Cir. 1987) (violation of Farmers Home Administration regulations does not result in the loss of qualified immunity).

In short, the Ninth Circuit's decision in this case is not only incompatible with *Davis v. Scherer*, it is also in conflict with the law of virtually every other circuit. The failure to grant this writ of certiorari would therefore introduce confusion and schism in a heretofore consistent area of federal law. More egregiously, it would uniquely subject public officials in the Ninth Circuit to an aberrant and unfair rule of liability. On both grounds, the writ of certiorari should be granted.

II. THE NINTH CIRCUIT MISAPPLIED THE TEST LAID DOWN IN *MATHEWS V. ELDRIDGE* AND ERRONEOUSLY CONCLUDED THAT FEDERAL DUE PROCESS REQUIRES A PRETERMINATION HEARING PRIOR TO THE EMERGENCY SUSPENSION OF DAY-CARE LICENSES

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court identified three separate factors to be weighed in determining the procedural safeguards that are required by Due Process Clause in a given situation:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interests through the procedures used, and finally, the Government's interest, including the function included and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 335.

The Ninth Circuit, paying belated lip-service to this test,[4] misapplied all three prongs. Addressing the first factor, the Court of Appeals equated Chalkboard's corporate license to operate the day-care business with the pursuit of livelihood and, citing *Bell v. Burson*, 402 U.S. 535, 539 (1971),[5] concluded that Chalkboard's interest was "similarly high." Its conclusion totally ignored the fact that

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[4] Its original opinion failed to consider the third prong of the *Mathews v. Eldridge* test.

[5] *Bell v. Burson* involved the suspension of a driver's license. That decision has been significantly limited by this Court's later driver's license decisions of *Dixon v. Love*, 431 U.S. 105 (1977) and *Mackey v. Montrym*, 443 U.S. 1 (1979).

day-care businesses are "pervasively regulated"[6] by the state.[7] Moreover, as an Arizona for-profit corporation, Chalkboard was engaged in a pure business activity for financial gain. Certainly, its property interest in its license is not as great as the driver's license interest involved in *Bell v. Burson*; and it clearly is of a lower order than the right to receive welfare benefits essential to survival, *cf. Goldberg v. Kelly*, 397 U.S. 254 (1970). The fact that Chalkboard's owner may have depended upon the corporation for her livelihood[8] is irrelevant and does not elevate a low-level corporate business interest into a higher "livelihood" interest. Where public health, safety or welfare are involved there is no legitimate basis for the state to draw distinctions between corporations on which the owner's livelihood happens to depend, and corporations that are more well-endowed and financed.

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[6] *Cf. Heckler v. Day*, 467 U.S. 104 (1984); *Shoemaker v. Handel*, 795 F.2d 1136 (3rd Cir. 1986) cert. den. 479 U.S. 986 (1986) (horse racing industry is pervasively regulated so as to defeat a Fourth Amendment challenge).

[7] *See* A.R.S. §§ 36-881 through 895 setting forth the requirements of licensing; standard of care; registration of personnel and their fingerprinting; inspection without announcement; record inspection; criminal sanctions, etc.

[8] A fact which was not known to the state defendants at the time of the summary suspension order.

The Ninth Circuit's application of the second prong of the *Mathews* test was also flawed. It reasoned:

> Whether or not instances of child abuse have occurred, and whether public health, safety and welfare require emergency action, are delicate judgments depending on credibility of witnesses and assessment of conditions not subject to measurement. The risk of error is considerable when such determinations are made after hearing only one side. (A-11-12) 902 F.2d at 1381.

The Court then concluded that "Chalkboard's case is closer to *Goldberg v. Kelly*, 397 U.S. 254 (1970), in which the Court required an evidentiary hearing prior to termination of welfare benefits." *Id.* In reaching this conclusion, the Court of Appeals totally ignored the fact that 85% of the pupils at Chalkboard were enrolled under a state contract for low income families, and that an administrative hearing was scheduled only eight days after the summary suspension order. Had the summary suspension been judged erroneous, the state contract would have been immediately reinstated and Chalkboard's financial loss would have been largely confined to the loss of income for eight days. Contrasted with this minor financial risk to Chalkboard, the potential risk of physical and emotional harm to the young children, and the attendant exposure of the state to tort liability as the guardian of these children, was quite high.

More seriously, the Ninth Circuit's analysis of the second prong leads inescapably to the conclusion that *all* emergencies involving public health, safety or welfare require pretermination hearings, since in such emergencies, decisions are typically made after a hearing from only one side. This reasoning simply cannot be squared

with the long line of decisions of this Court to the contrary. *See e.g. Ewing v. Mytinger & Casselberry,* 339 U.S. 594 (1950) (summary seizure of misbranded drugs); *Fahey v. Mallonee,* 332 U.S. 245 (1947) (summary action approved in connection with a bank failure); and *North American Cold Storage Co. v. Chicago,* 211 U.S. 306 (1908) (sustaining the seizure of contaminated food).

Finally, in addressing the last prong of the *Mathews* test – the government's interest – the Court of Appeals not only ignored *Ewing, Fahey* and *North American Cold Storage Co.,* it also ignored this Court's more recent opinions in *Dixon v. Love,* 431 U.S. 105 (1977), *Mackey v. Montrym,* 443 U.S. 1 (1979) and *Barry v. Barchi,* 443 U.S. 55 (1979). These latter cases held that the government's interest in connection with highway safety and maintaining the integrity of horse racing overrode the right to a hearing prior to the suspension of a driver's and horse trainer's license respectively. In contrast, the Ninth Circuit gave short shrift to the state's overriding interest in the protection of its children – an interest undeniably greater than horse racing, and equal, if not greater than highway safety. The state's interest in the well-being of its children is of the highest magnitude and has long been recognized by this Court. *See Prince v. Massachusetts,* 321 U.S. 158 (1944); *McKeiver v. Pennsylvania,* 403 U.S. 528, 550 (1971); *Bellotti v. Baird,* 443 U.S. 622 (1979) (plurality opinion); and *City of Dallas v. Stanglin,* ___ U.S. ___, 109 S.Ct. 1591 (1989).

In fact, the Ninth Circuit did not conduct the independent analysis required by the third prong of the *Mathews* test. Rather, the Court deferred to the Arizona

legislature – or more accurately, to its own perception of *Arizona* procedural law. The Court of Appeals stated:

> The key element, as we will show, is that defendants failed to follow the emergency injunction procedures specified by the Legislature and instead effected the summary suspension themselves. (A-13) 902 F.2d at 1381.

This language is in conflict with this Court's decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). There, the Court flatly rejected the argument that because state law creates the property interest, state procedure law should control the due process analysis:

> In *Vitek v. Jones*, 445 U.S. 480, 491 (1980) we pointed out that "minimum [Procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." This conclusion was reiterated in *Logan v. Zimmerman Brush Co.*, 445 U.S. 422, 432 (1982) where we reversed the lower court's holding that because the entitlement arose from a state statute, the legislature had the prerogative to define the procedures to be followed to protect that entitlement. * * *
>
> In short, once it is determined that the Due Process Clause applies, "the question remains what process is due." [Citation omitted]. The answer to that question is not to be found in the Ohio statute. 470 U.S. at 541.

See also Santosky v. Kramer, 455 U.S. 745, 755 (1982).

Finally, *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264 (1981), which the Ninth Circuit also apparently relied upon to justify its finding of a due process violation, does not support such a conclusion. In

Virginia Surface Mining, this Court upheld, against a Due Process Clause challenge, a statutory provision giving the Secretary of Interior the power to order the immediate cessation of surface mining activities. This Court explained:

> The relevant inquiry is not whether a cessation order should have been issued in a particular case, but whether the statutory procedure itself is incapable of affording due process. [Citation omitted]. The possibility of administrative error is inherent in any regulatory program; statutory programs authorizing emergency administrative action prior to a hearing are no exception. As we explained in *Ewing v. Mytinger & Casselberry*, 339 U.S. at 599:
>
> > "Discretion of any official action may be abused. Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, there is at some stage an opportunity for a hearing and a judicial determination."
>
> Here, mine operators are afforded prompt and adequate post-deprivation administrative hearings and an opportunity for judicial review. We are satisfied that the Act's immediate cessation order provisions comport with the requirements of due process. *Id.* at 302-303.

Simply stated, *Virginia Surface Mining* makes it clear that had the governing Arizona statute provided for immediate suspension, a prompt administrative hearing, and subsequent judicial review, – i.e. the very procedures followed here – the suspension would fully comport with federal due process. *Virginia Surface Mining* does not stand for the proposition that simply because a state

official erroneously believed that such statutory procedures were available to him, the same conduct would violate the Due Process Clause! In short, federal due process requirements cannot be made subject to the varying dictates of the legislative branches of the fifty states. The inquiry before the federal court is not whether or not *Arizona* law provides for a pretermination hearing, but rather, what process is due under the federal constitution. *Cleveland Board of Education v. Loudermill*, 470 U.S. at 541. The Ninth Circuit misunderstood this critical distinction and failed to make the proper analysis required by the decisions of this Court.

III. THE NINTH CIRCUIT'S CONCLUSION THAT DAY-CARE CENTERS ARE ENTITLED TO PRETERMINATION HEARINGS IS IN CONFLICT WITH THE LAW OF THE TENTH CIRCUIT AND THE DECISION OF THE NEBRASKA SUPREME COURT.

Two other jurisdictions have considered the precise due process issue involved here, and applying the same Supreme Court precedents, have reached a conclusion opposite to that of the Ninth Circuit. In *Dieter v. State Department of Social Services*, 228 Neb. 368, 422 N.W.2d 560 (1988), the Nebraska Supreme Court sustained the summary revocation of a day-care license which followed an investigation into complaints of spanking and force-feeding of children. Applying the *Mathews v. Eldridge* test, the Nebraska Supreme Court concluded that a Pretermination hearing was not mandated by federal due process. The Court reasoned:

> In the case before us, consideration of the three [*Mathews*] factors in the light of the private and governmental interests at state leads to the conclusion that due process in this case does not require an evidentiary hearing before the revocation of appellant's day-care facilities licenses. The result of the investigations submitted to the director disclosed conduct which could well result in harm to children. Balanced against that possible harm was appellant's right to conduct her business. *The interests of DSS in ensuring the safety and well-being of the children at the day-care facilities outweighs appellant's interests in the pecuniary return from her day-care operations.* Under the facts of this case, no pre-revocation hearing was constitutionally required before the revocation of appellant's licenses. 422 N.W.2d at 567. [Emphasis added].

Similarly, the Ninth Circuit's analysis is in conflict with the law of the Tenth Circuit. In *Rice v. Virgil*, 642 F.Supp. 212 (D.N.M. 1986), *aff'd* 854 F.2d 1323 (10th Cir. 1989), the court was confronted with the argument that New Mexico law provided the day-care center with a right to predeprivation hearing by means of a "consultation" notice. After rejecting that argument, the Court went on and said:

> Assuming, however, that plaintiff had a protected property interest that was implicated by defendants' conduct, she was nevertheless not entitled to a predeprivation hearing. 642 F. Supp. at 218.

In applying the three prongs of the *Mathews* test the district court stated:

> Although the interest in one's economic benefit is important, like the interest in employment, it "does not amount to the 'brutal need' noted in

> *Goldberg v. Kelly*, 397 U.S. 254 (1970)." 642 F.Supp. at 219 [quoting *Rosewitz v. Latting*, 689 F.2d 175, 177 (1982)].

After concluding that the risk of erroneous deprivation remained high even if a predeprivation "consultation" was given, the district court opined:

> The governmental interest in transferring children to other day-care facilities pending completion of the investigation was extremely weighty. Had the allegations of abuse proved true, to have kept the children at Little Flower while the investigation was completed and an evidentiary hearing was held could have exposed those children to further abuse. Applying the three-part test of *Mathews v. Eldrige, the governmental interest in removing the children from a potentially dangerous situation outweighed plaintiff's interest in a predeprivation hearing and investigation. Id.* at 219. [Emphasis added].

This decision was approved and affirmed by the Tenth Circuit Court of Appeals. 854 F.2d 1323 (10th Cir. 1989).

These decisions correctly apply the due process guidelines laid down by this Court and underscore the errors in the Ninth Circuit's analysis. The need for consistency in this important area of the law further warrants the allowance of this writ.

IV. THE NINTH CIRCUIT'S REQUIREMENT OF A FACTUAL *POST HOC* JUDICIAL HEARING TO DETERMINE WHETHER THERE WAS AN "EMERGENCY" IS CONTRARY TO *MACKEY V. MONTRYM* AND OTHER DECISIONS OF THIS COURT.

The Court of Appeals also affirmed the District Court's order requiring a factual hearing on the issue of

an emergency, stating: "Chalkboard strongly disputes, however, the existence of an emergency and the facts are sufficiently in dispute to preclude resolution of that issue on summary judgment." (A-13) 902 F.2d at 1381. If allowed to stand, the above rationale would mean that even if the state had probable cause to believe that an emergency condition justified summary action, a pretermination hearing [or a *post hoc* judicial determination] would always be required if the facts are disputed. Such a principle would completely nullify precedents such as *Ewing v. Mytinger & Casselberry, Fahey v. Williams* and *North American Cold Storage Co. v. Chicago,* as well as *Dixon v. Love, Mackey v. Montrym* and *Barry v. Barchi.* In each of these cases, the affected parties disputed the underlying facts giving rise to the summary action by public officials. Yet, summary actions were approved.

This Court very recently reiterated its disapproval of such *post hoc* evaluation "because judges engaged in *post hoc* evaluations of government conduct 'can always imagine some alternative means by which the objectives of the [Government] might have been accomplished.' " *Skinner v. Railway Labor Executives Association,* ___ U.S. ___, 109 S.Ct. 1402, 1419 n. 9 (1989)

The Court of Appeals' rationale also ignored this Court's recognition in *Scheuer v. Rhodes,* 416 U.S. 232, 246 (1974) that:

> [O]fficials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office.

While the Court of Appeals might wish to ensure that every emergency action is "error free" by means of an

after-the-fact judicial determination, this Court has repeatedly rejected such a requirement. In *Mackey v. Montrym*, 443 U.S. 1, 13 (1979), the Court stated:

> [T]he Due Process Clause has never been construed to require that the procedures used to guard erroneous deprivation of a protectible "property" or "liberty" interest be so comprehensive as to preclude any possibility of error. The Due Process Clause simply does not mandate that all governmental decision making comply with standards that assure perfect, error-free determination.

And in *Turner v. Safley*, 482 U.S. 78, 89 (1987), the Court similarly reasoned that such second-guessing:

> [W]ould also distort the decision making process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand.

See also Black v. Romano, 471 U.S. 606, 613 (1985) (Due process does not require a reviewing court to second guess the fact finder's discretionary decisions as to appropriate sanctions); and *Baker v. McCollan*, 443 U.S. 137, 146 (1979) (Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person, nor that officials "be required" to perform an error-free investigation).

Finally, conditioning qualified immunity on an after-the-fact judicial determination of "emergency" is directly contrary to this Court's opinion in *Anderson v. Creighton*, 483 U.S. 635, 641 (1987):

> We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials – like other officials who act in ways they reasonably believe to be lawful – should not be held personally liable. *See, Malley v. Briggs, supra,* 475 U.S. at 344-345. The same is true of their conclusion regarding exigent circumstances. *Id.* at 641.

V. THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH THIS COURT'S RULE THAT QUALIFIED IMMUNITY IS NOT FORFEITED UNLESS THE DUE PROCESS RIGHTS WERE "CLEARLY ESTABLISHED"

Even if it is assumed, arguendo, that the Court of Appeal was correct in its due process analysis, the denial of qualified immunity cannot be sustained. This Court has repeatedly held that state officials do not forfeit their qualified immunity from damage suits unless the federal due process requirements that they purportedly violated were "clearly established." *Harlow v. Fitzgerald,* 457 U.S. 800 (1982); *Anderson v. Creighton,* 483 U.S. 635 (1987). It would be patently unreasonable to subject public officials to onerous damage suits in situations where the federal due process rights were ill-defined or had never been previously recognized. For this reason, *Anderson v. Creighton* emphasizes that the "clearly established" test is one that is not satisfied by mere generalities. Rather, qualified immunity is lost only where the *particularized* due process right was "clearly established" in the law. As stated in *Anderson*:

[T]he right to due process of law is quite clearly established by the DUE PROCESS CLAUSE, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases clearly establish into a rule of virtually unqualified liability simply by alleging a violation of an extremely abstract right. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading. Such an approach, in sum, would destroy "the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties,' by making it impossible for officials 'reasonably [to] anticipate when their conduct may give rise to liability for damages." [Citing *Davis v. Scherer*], 468 U.S., at 195. It should not be surprising, therefore that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense. The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has been held unlawful, *see Mitchell [v. Forsythe]*, 472 U.S. at 535, n. 12; but it is to say that in light of the preexisting law the unlawfulness must be apparent. *Id.* at 639-640

Under no reasonable analysis can a day-care center's right to a hearing prior to emergency suspension of its license be characterized as "clearly established" under *Anderson*. First, prior reported decisions, applying this Court's guidelines, have concluded, contrary to the Ninth Circuit, that there is no such federal right. *See Dieter v. State Department of Social Services*, 228 Neb. 368, 422 N.W. 2d 560 (Neb. 1988) and *Rice v. Virgil*, 642 F.Supp. 212 (D.N.M 1986), *aff'd* 854 F.2d 1323 (10th Cir. 1989) and discussion of these cases, *supra* at pp. 19-21. Thus, to the extent that the law was "clearly established" prior to the Ninth Circuit's decision, it was established in favor of the action taken by the state defendants.

Secondly, although this Court has not yet addressed the pretermination hearing issue in connection with day-care licenses, this Court's decisions in other public health, safety and welfare contexts fully recognize the legality of summary suspensions with prompt post-termination hearings. See supra at pp. 15-16. Certainly, against the backdrop of these cases, and in the absence of any authority to the contrary, it was not unreasonable for the state officials to conclude that children were entitled to no lesser protection than that afforded to highway safety and horse racing interests. *See* supra at p. 16.

Finally, the Ninth Circuit offers no sound counter argument to support its conclusion that a day-care center's right to a pretermination hearing is "clearly established" in the law. Rather, the Court merely cites the purported violation of the state statute and *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Neither citation suffices.

First, as the petitioners have previously argued, (see *supra* at pp. 8-12) the Ninth Circuit's repeated reliance on "violation" of Arizona law is completely erroneous. State procedural requirements do not establish the existence or nonexistence of federal due process requirements. Moreover, even with regard to state law, the situation can hardly be characterized as "clear," given the existence of two statutes, one of which authorized the precise procedures followed by the defendants. In fact, this case is the *first* reported case to have ever construed the relationship between the two statutes or to have concluded that the statute relied upon by the defendants was inapplicable.[9]

Secondly, the Ninth Circuit's generalized reference to *Loudermill* also does not satisfy the "clearly established" standard laid down in *Anderson*. Although *Loudermill* found a due process right to a pretermination hearing, it did so in the very different context of government employment. In fact, *Loudermill* itself recognized that "[t]here are, of course, some situations in which a post deprivation hearing will satisfy due process requirements." 470 U.S. at 542, n.7. Since employment cases do not ordinarily raise the counterbalancing public health

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[9] The District Court rejected the defendants' request for abstention on the state law question and the Court of Appeals denied the defendants' motion to certify the state law question to the Arizona Supreme Court. The Ninth Circuit simply concluded that in case of a conflict the more specific statute controlled over the general one. While this is a sound principle of statutory construction, petitioners maintain that the two statutes are not in conflict, and that state law requires that they both be given effect if at all possible.

and safety considerations which arise in day-care and other sensitive licensing contexts, the balance applied in *Loudermill* hardly resolves the very different interests involved here.[10] Indeed, the Ninth Circuit's reliance on *Loudermill* is precisely the type of generalized argument that this Court condemned in *Anderson*.

In short, the Ninth Circuit's due process analysis, with its deference to state law and devaluation of child health, safety, and welfare interests can only be described as "novel." Whatever the merits of the analysis, it cannot be characterized as "clearly established." The state defendants should not be penalized for failing to anticipate the Ninth Circuit's ruling.

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[10] Acknowledging the rare case where the retention of an employee could result in some public hazard, *Loudermill* further reasoned:

> Finally, in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay. 470 U.S. at § 544-545 [footnote omitted].

Clearly, this option does not exist in the licensing situation, which further emphasizes the differences between the employment and day-care licensing contexts.

CONCLUSION

This case cries out for this Court's review. The Court of Appeals' opinion completely disregards *Davis v. Scherer* and uses an ambiguous state law violation to deny qualified immunity; it misapplies the due process test required by *Mathews v. Eldridge* and completely undervalues overriding public health, safety and welfare interests; it ignores the commands of *Mackey v. Montrym* that public officials must be afforded some leeway in the discharge of their duties, and instead predicates immunity on an after-the-fact assessment of emergency conditions; and finally, contrary to *Anderson v. Creighton*, it unfairly characterizes its own idiosyncratic holding as being "clearly established" in the law, so as to deprive the defendants of the qualified immunity guaranteed by the decisions of this Court. The Ninth Circuit's opinion is squarely in conflict with all the other circuits which have properly followed the mandates of *Davis v. Scherer*, and its due process ruling is in direct conflict with the Tenth Circuit and the Nebraska Supreme Court.

Petitioners respectfully pray for the grant of this writ. Fundamental questions of federal jurisprudence are at stake here. Equally important, however, is the context. If this ruling is allowed to stand, it will have an incalcuable, chilling impact on state's ability to protect its young children from grevious harms. It signals that case workers, investigators, and other public officials who act reasonably and in good faith to protect public safety in emergency situations may be held personally liable for

monetary damages if their judgments are subsquently questioned. This is not the law and it should not be the law.

Respectfully submitted.

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August 8, 1990

APPENDIX

TABLE OF CONTENTS

Appendix A

CHALKBOARD, INC.; Karen M. Hoyt,
Plaintiffs-Appellees,

v.

Susan BRANDT; Boyd Dover; Lucinda Blair; Andy Harclerode; Sherry Meredith; Lloyd Novick; Douglas X. Patino; Darwin Cox, Defendants-Appellants.

No. 88-1523.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 15, 1988.

Decided July 13, 1989.

Amended May 11, 1990.

Before PREGERSON, CANBY and BEEZER, Circuit Judges.

CANBY, Circuit Judge:

The plaintiffs, Chalkboard, Inc., a day care center, and its owner-operator Karen Hoyt[1] brought this civil rights action in District Court for money damages against officials of the Arizona Department of Health Services ("DHS"), and the Arizona Department of Economic Security ("DES"), agencies responsible for child day care programs. The claim is based on defendants' actions in summarily suspending Chalkboard's license to operate a day care center. The defendants moved for summary judgment on grounds of absolute and qualified immunity. The District Court denied the motion and the defendants appeal. We have jurisdiction over this interlocutory appeal under 28 U.S.C. § 1291. *See Mitchell v. Forsyth*, 472

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[1] Hereafter we refer to both plaintiffs as "Chalkboard".

U.S. 511, 530, 105 S.Ct. 2806, 2817, 86 L.Ed.2d 411 (1985); *Kraus v. County of Pierce*, 793 F.2d 1105, 1107-8 (9th Cir.1986), *cert. denied*, 480 U.S. 932, 107 S.Ct. 1571, 94 L.Ed.2d 763 (1987).

We review de novo the denial of defendants' motion for summary judgment. *Kraus v. County of Pierce*, 793 F.2d at 1106-07. We affirm.

FACTUAL BACKGROUND

On October 10, 1985, the Tucson Police Department received a complaint from a local citizen that her young daughter had been sexually abused while at Chalkboard by a teacher on its staff. The Police notified the Office of Child Protective Services, a unit of DES, and defendant Susan Brandt of DES began an investigation. On the same day, DHS, the agency responsible for licensing and monitoring day care centers, was notified and also initiated an investigation.

During the next several days Brandt learned from interviews with students and one former employee of Chalkboard of at least one other complaint of sexual abuse concerning the same teacher. She also learned of several complaints of physical abuse, including the disciplining of children by tying their hands behind their backs with sheets, placing the children on a high shelf, or locking them in a shed or outside of the center. The former employee testified at a deposition that she had informed the investigators that the incidents of physical abuse had stopped nearly two months prior to the investigation. These accusations were also encountered by two investigators from DHS, defendants Sherry Meredith and

Lucinda Blair. The DHS investigators learned from Hoyt that the teacher accused of the sexual abuse incidents had been suspended pending the outcome of the investigation. While at Chalkboard, the DHS investigators also noted that the day care center was over capacity, a problem of which Chalkboard had already been warned in 1983.

On October 16, 1985, defendant Boyd Dover, Deputy Director of DHS, issued an order summarily suspending Chalkboard's license on the grounds of the alleged sexual molestation, the alleged physical abuse, and overcrowding. On the following day, an administrator of DES stood on the sidewalk in front of Chalkboard to inform parents of the closure and advise them of alternative day care centers. The press was also present at this time. Prior to Chalkboard's closure, approximately 85% of its enrollment was under contract with DES. The license suspension automatically resulted in cancellation of these contracts as well as Chalkboard's Department of Agriculture funding for food programs.

On the day of the suspension, Hoyt was notified of an administrative hearing on the license suspension to be scheduled in the near future. This hearing was subsequently scheduled for October 24, 1985, eight days after the suspension. Immediately after the suspension, however, Chalkboard had filed an action in Arizona Superior Court seeking an injunction. On October 18, at a bearing in state court, Chalkboard sought leave to withdraw the complaint, which was granted. On October 23, 1985, this action was filed. On October 24, Chalkboard appeared at

the administrative hearing and stipulated to a postponement. Ultimately, Chalkboard elected not to attend the hearing.

ABSOLUTE IMMUNITY

Defendants first argue that they are absolutely immune. In general, executive officials are protected from constitutional claims only by qualified immunity. *Butz v. Economou*, 438 U.S. 478, 507, 98 S.Ct. 2894, 2911, 57 L.Ed.2d 895 (1977). In certain instances, however, executive officials may be entitled to absolute immunity, but such instances are limited "to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of public business." *Id.* The burden is on the official seeking immunity to show that the immunity is "justified by overriding considerations of public policy." *Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988).

The Supreme Court has made clear that absolute immunity depends upon the particular function performed by the official. *Butz*, 438 U.S. at 508, 98 S.Ct. at 2911. The question is not one of status, but of the "nature of the responsibilities of the individual official." *Cleavinger v. Saxner*, 474 U.S. 193, 201, 106 S.Ct. 496, 500, 88 L.Ed.2d 507 (1985). The prime categories of executive officials that are entitled to absolute immunity are those whose functions parallel the functions of judges and prosecutors. *Butz*, 438 U.S. at 511-15, 98 S.Ct. at 2913-15; *see Schlegel v. Bebout*, 841 F.2d 937, 942 (9th Cir.1988). It is these categories into which defendants seek to fit themselves.

This case arises, however, out of the DHS officials' summary closure of Chalkboard. To the extent that such action may be judicial or prosecutorial, it is essential that this function be assigned by state law to the DHS. A judge who wrongfully sentences an accused to prison is absolutely immune; a policeman who takes it upon himself to perform that function clearly is not. We must therefore examine whether the DHS officials were placed, under state law, in the functions equivalent to those of judge or prosecutor with regard to Chalkboard's summary closure.

The DHS officials contend that they were authorized summarily to close Chalkboard under Ariz.Rev.Stat.Ann. § 41-1064(C)(1988)[2], which states:

> No revocation, suspension, annulment or withdrawal of any license is lawful unless, prior to the action, the agency provides the licensee with notice and an opportunity for a hearing in accordance with this chapter. If the agency finds that public health, safety or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

This provision is part of the Arizona Administrative Procedure Act, which forms a general set of rules applicable to administrative agencies in the absence of a more specific statutory structure. *See Didlo v. Talley,* 21

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[2] This section was formerly codified at Ariz.Rev.Stat.Ann. § 41-1012(c).

Ariz.App. 446, 448, 520 P.2d 540, 542 (1974). Chalkboard contends, and the district court held, that DHS was governed by just such a specific statutory structure that included a provision for obtaining expedited closure of day care centers. Ariz.Rev.Stat.Ann. § 36-886.01 (1986) provides:

> When the department has reason to believe that a day care center is operating under conditions that present possibilities of serious harm to children, the department shall notify the county attorney or the attorney general, who shall immediately seek a restraining order and injunction against the day care center.[3]

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[3] This procedure is considerably more expeditious than the normal license suspension procedure under the same statutory scheme, Ariz.Rev.Stat.Ann. § 36-889. The later statute provides:

> The department may revoke or suspend the license of any person for a violation of applicable law or regulations. The department shall afford the affected licensee the right of a hearing by serving upon the licensee at least thirty days' notice, by registered mail with return receipt requested, to show cause before the director, upon a date to be fixed in the notice, why the license should not be suspended or revoked in accordance with the regulations of the department and the provisions of law. The notice shall set forth the act or acts constituting the violation and shall refer to the provisions of the applicable law or regulations alleged to be violated. If the licensee does not respond to the written notice within the period provided in the notice, the department shall revoke or suspend the license. If the licensee, within the period provided by the notice,

(Continued on following page)

The district court concluded that the two provisions were in conflict and that Arizona law dictates the statutory conflicts be settled in favor of the more specific statute. *See Arden-Mayfair, Inc. v. Department of Liquor Licenses and Control*, 123 Ariz. 340, 342, 599 P.2d 793, 795 (1979); *Arizona State Tax Commission v. Phelps Dodge Corporation*, 116 Ariz. 175, 177, 568 P.2d 1073, 1075 (1977) (en banc), *cert. denied*, 434 U.S. 1047, 98 S.Ct. 893, 54 L.Ed.2d 798 (1978). The DHS officials maintain that there was no conflict between Ariz.Rev.Stat.Ann. § 41-1064(C) and Ariz.Rev.Stat.Ann. § 36-886.01, and that DHS was free to use either provision.

While the Arizona Supreme Court has never defined the relationship between the two statutes, its decisions in *Arden-Mayfair* and *Phelps Dodge, supra*, render the officials' view implausible. We cannot accept the contention that a general purpose summary-closure provision enacted years earlier remains at the disposal of the DHS officials when the state has adopted a more recent and specific statutory scheme which provides for both routine and expedited methods of suspending the license of a day care center and which does not permit summary action by agency officials.

Thus, Arizona has provided, under section 36-886.01, for prosecutors and judges to effect a summary closure of day care centers. It is entirely possible that DHS officials

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(Continued from previous page)

rectifies the acts constituting the violation, the department may withdraw the notice of suspension or revocation.

who directly serve that process in one way or another will be absolutely immune. *See Coverdell v. Department of Social and Health Services,* 834 F.2d 758, 762-64 (9th Cir.1987) (social worker seeking and obtaining a child dependency order is absolutely immune). But in by-passing the statutorily mandated procedure entirely,[4] and arrogating to themselves a function that state law denies them, defendants have not served in a judicial or prosecutorial capacity that conferred absolute immunity.

Our precedent supports our conclusion that state law must authorize the prosecutorial or judicial function to which absolute immunity attaches. In *Ybarra v. Reno Thunderbird Mobile Home Village,* 723 F.2d 675 (9th Cir.1984), we held a prosecutor to be absolutely immune in releasing certain evidence after trial, pointing out that he acted "well within his authority as a deputy district attorney, empowered to preserve or to release" the evidence. *Id.* at 678. Similarly, in *Coverdell,* we emphasized that the absolutely immune social worker's action in seeking a court order was "not only within the scope of her authority under Washington law, [but] may well have been required." *Coverdell,* 834 F.2d at 764. Here, in summarily closing Chalkboard without a hearing, DHS was

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[4] *Cf. Meyers v. Contra Costa County Dep't of Social Services,* 812 F.2d 1154, 1157 (9th Cir. 1987), *cert. denied,* 484 U.S. 829, 108 S.Ct. 98, 98 L.Ed.2d 59 (1987) (absolute immunity denied to social worker who ordered father away from his home; "[r]ather than contributing to an informed judgment by an impartial decisionmaker as an advocate, [social worker] acted unilaterally prior to the operation of the judicial process").

not acting in a role assigned to it by state law.[5] The district court was correct in denying absolute immunity.

QUALIFIED IMMUNITY

The fact that state law did not put the defendants in the position of prosecutors or judges does not, however, necessarily deprive them of all immunity. *See Meyers*, 812 F.2d at 1157-58. Executive officials are protected against actions for damages by the doctrine of qualified immunity unless "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).

The constitutional violation alleged in this case is the deprivation of property without due process of law. While the right to due process is clearly established under the fourteenth amendment, the issue of qualified immunity cannot be resolved at such a high level of generality. *Anderson v. Creighton*, 483 U.S. at 639, 107 S.Ct. at 3038. Instead, the question for out determination is whether, in light of clearly established law and the circumstances of this particular case, reasonable officers

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[5] We thus distinguish cases such as *Horwitz v. Bd. of Medical Examiners*, 822 F.2d 1508 (10th Cir.) *cert. denied*, 484 U.S. 964, 108 S.Ct. 453, 98 L.Ed.2d 394 (1987), and *Austin Municipal Securities v. Nat'l Ass'n of Securities Dealers*, 757 F.2d 676 (5th Cir.1985), where members of boards *exercising statutorily-delegated authority* to suspend professional licenses summarily were accorded absolute immunity.

would have known that it was not lawful for them to suspend Chalkboard's license and close the facility without prior notice and an opportunity for Chalkboard to respond. *See id.* at 640, 107 S.Ct. at 3039.

The defendants do not dispute that Chalkboard's license constitutes an entitlement amounting to a property interest. Nor do they dispute that a deprivation occurred. The questions that divide the parties are what process was due, and what process should reasonable officers have known to be due. The focus is on the need for some form of predeprivation review.

We begin with the proposition that a requirement of predeprivation process is the norm:

> An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.' *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 [70 S.Ct. 652, 656, 94 L.Ed. 865] (1950). We have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.' *Boddie v. Connecticut*, 401 U.S. 371, 379 [91 S.Ct. 780, 786, 28 L.Ed.2d 113] (1971) (emphasis in original); *see Bell v. Burson*, 402 U.S. 535, 542 [91 S.Ct. 1586, 1591, 29 L.Ed.2d 90] (1971).

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542 [105 S.Ct. 1487, 1493, 84 L.Ed.2d 494] (1985). This principle is so well established that reasonable officers would have known of it.

The next question, then, is whether reasonable officers would have known that the usual requirement of

predeprivation process applied in the circumstances of this case. To determine whether the administrative process employed by defendants was constitutionally deficient and, if so, whether it was *clearly* deficient, we must begin by considering three distinct factors: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation through the procedures used and the value of additional procedures; and (3) the government's interest, including the function involved and the burden that additional procedural requirements would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976).

A balancing of these factors, as they were applied in *Mathews* and, subsequently, in *Loudermill*, leads us to conclude that the administrative procedures followed by defendants in this case could not reasonably have been believed to meet constitutional requirements. First, the private interest was clearly substantial. Plaintiff Hoyt was the owner and operator of Chalkboard, and the license was essential to its entire business. Indeed, summary suspension on the ground of child abuse was likely to have severe and permanent consequences for plaintiffs regardless of the ultimate resolution of the charges. As the Supreme Court has noted in the case of a driver's license, "[o]nce licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood." *Bell v. Burson*, 402 U.S. 535, 539, 91 S.Ct. 1586, 1589, 29 L.Ed.2d 90 (1971). The private interest here was similarly high.

The risk of erroneous deprivation in cases like Chalkboard's is also high. Whether or not instances of child abuse have occurred, and whether public health, safety

and welfare require emergency action, are delicate judgments depending on credibility of witnesses and assessment of conditions not subject to measurement. The risk of error is considerable when such determinations are made after hearing only one side. *See Loudermill*, 470 U.S. at 543 & n. 8, 105 S.Ct. at 1493 & n. 8. Chalkboard's case is consequently quite different from those cases invoked by defendants where the factual issue to be determined was susceptible of reasonably precise measurement by external standards. *See, e.g., Dixon v. Love*, 431 U.S. 105, 113, 97 S.Ct. 1723, 1727, 52 L.Ed.2d 172 (1977) (suspension of driver's license when convicted of offenses totalling predetermined number of points); *Mackey v. Montrym*, 443 U.S. 1, 14, 99 S.Ct. 2612, 2619, 61 L.Ed.2d 321 (1979) (suspension of driver's license upon refusal to take breathalyzer test); *Barry v. Barchi*, 443 U.S. 55, 65, 99 S.Ct. 2642, 2649, 61 L.Ed.2d 365 (1979) (suspension of horse trainer's license predicated on chemical testing of horses for which trainer responsible). Similarly distinguishable is *Mathews v. Eldridge* itself, where the issue was whether a worker was disabled by a medically determinable physical or mental impairment. "This is a more sharply focused and easily documented decision than the typical determination of welfare entitlement." *Id.* 424 U.S. at 343, 96 S.Ct. at 907. Chalkboard's case is closer to *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), in which the Court required an evidentiary hearing prior to termination of welfare benefits. The risk of error without a hearing was great, and the value of a hearing clear, because "a wide variety of information may be deemed relevant, and issues of witness credibility and veracity often are critical to the decision-making process."

Mathews, 424 U.S. at 343-44, 96 S.Ct. at 907 (describing *Goldberg*); *see also Loudermill*, 470 U.S. at 543-44, 105 S.Ct. at 1493-94.

The final factor in the *Mathews* analysis – the government's interest, including the function involved and the burdens that additional procedural requirements would entail – also militates, on balance, in favor of a requirement of predeprivation notice and an opportunity to respond. The key element, as we will show, is that defendants failed to follow the emergency injunction procedures specified by the legislature, and instead effected the summary suspension themselves.

The defendants contend that the summary suspension did not violate procedural due process because swift action was needed to protect the welfare of children. The state's interest in protecting children is undeniably great. Chalkboard strongly disputes, however, the existence of an emergency, and the facts are sufficiently in dispute to preclude resolution of that issue on summary judgment.[6] The defendants urge, however, that there is no need to establish an emergency in this particular instance; it is sufficient that the action taken was of a *category* that justifies dispensing with the normal due process requirement of predeprivation notice and opportunity to

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[6] We have noted that "[i]n a case where patient welfare is in immediate jeopardy or where the effective functioning of the hospital is severely threatened, a hospital might well be justified in immediate termination [of a physician] with the informal hearing procedures held shortly hereafter." *Stretten v. Wadsworth Veterans Hospital*, 537 F.2d 361, 369 n. 20 (9th Cir. 1976).

respond: Defendants rely on our recent decision in *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310 (9th Cir. 1989), where we held that due process was not violated by a system of summary suspension of bulk fuel permits where swift action was necessary to protect the public health and safety. We stated that "the relevant inquiry is not whether a suspension should have been issued in this particular case, but whether the statutory procedure itself is incapable of affording due process." *Id.* at 1318 (paraphrasing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 302, 101 S.Ct. 2352, 2373, 69 L.Ed.2d 1 (1981)).

Soranno's Gasco and *Virginia Surface Mining* are easily distinguishable, however. In both cases, the courts were constrained to yield to *legislative* judgments regarding the threat to the public interest and the need for summary action. In *Soranno's Gasco*, we said:

> The California legislature has determined that swift administrative action may be necessary in order to protect the public health and safety from violations of the state's pollution control regulations. *We are not in a position to second-guess that legislative determination.*

874 F.2d at 1318 (emphasis added). Similarly, in *Virginia Surface Mining*, the Supreme Court held that the standards established by a governing statute sufficiently guided administrative discretion in taking emergency action prior to hearing. *Virginia Surface Mining*, 452 U.S. at 301-02, 101 S.Ct. at 2373-74.

In our case, however, the defendants chose *not* to follow the procedure specified by the state legislature for dealing with "conditions that present possibilities of

serious harm to children." Ariz.Rev.Stat.Ann. § 36-886.01 (1986). That statute, as we have already pointed out, requires the Department of Health Services to notify the county attorney or attorney general, who then must seek a restraining order and injunction from a court. *Id.* A restraining order may be granted without notice only upon a clear showing that irreparable injury will result before the opposing party can be heard, and upon certification of efforts to give notice or of reasons why it should not be required. Ariz.R.Civ.P. 65(d) (Supp. 1988).

Thus the state itself has specified the kind of emergency treatment required to safeguard the interests of its children. We are not entitled to second-guess that legislative determination, *Soranno's Gasco*, 874 F.2d at 1318, and neither are the defendants.

Because Arizona has provided procedures offering additional procedural protections, requiring notice and hearing in the absence of a showing of actual emergency, it follows that the burdens of such additional procedures are not a substantial factor in the *Mathews* balance. The state itself has found the burdens acceptable.

We conclude, therefore, that under a *Mathews* analysis, Chalkboard was entitled to notice and some form of opportunity to respond prior to the summary suspension of its license by the defendants.

We also conclude that reasonable officials would have known that the summary suspension effected in this case violated Chalkboard's due process rights. We assume that officials are aware of available decisional law. *Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986), *cert. denied*, 483 U.S. 1020, 107 S.Ct. 3263, 97

L.Ed.2d 762 (1987). It was clear at the time of Chalkboard's suspension that "some pretermination opportunity" to respond was required before deprivation of a property interest. *Loudermill*, 470 U.S. at 542, 105 S.Ct. at 1493. The state legislature had also made clear its specified procedure for dealing with emergencies potentially threatening the welfare of children in day care centers. In ignoring these procedures and summarily suspending Chalkboard's license without notice or an opportunity to respond, reasonable officials would have know that their actions were not lawful. It is not the rule that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . "; it is enough that "in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. at 640, 107 S.Ct. at 3039; *see, Wood v. Ostrander*, 851 F.2d 1212, 1217 (9th Cir. 1988).

We agree with the district court that, on the showing made upon motion for summary judgment, the unlawfulness of defendants' actions was apparent. Defendants accordingly failed to establish that they were entitled to judgment as a matter of law on the ground of qualified immunity. We therefore affirm the order of the district court denying defendants' motion for summary judgment. That is the only issue before us on this interlocutory appeal; we express no opinion, of course, on the proper direction of future proceedings or on the ultimate merits of the case.

AFFIRMED AND REMANDED.

APPENDIX B

CHALKBOARD, INC.; Karen M. Hoyt, Plaintiffs-Appellees,

v.

Susan BRANDT; Boyd Dover; Lucinda Blair; Andy Harclerode; Sherry Meredith; Lloyd Novick; Douglas X. Patino; Darwin Cox, Defendants-Appellants.

No. 88-1523.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Nov. 15, 1988.

Decided July 13, 1989.

Before PREGERSON, CANBY, and BEEZER, Circuit Judges.

CANBY, Circuit Judge:

The plaintiffs, Chalkboard, Inc., a day care center, and its owner-operator Karen Hoyt[1] brought this civil rights action in District Court for money damages against officials of the Arizona Department of Health Services ("DHS"), and the Arizona Department of Economic Security ("DES"), agencies responsible for child day care programs. The claim is based on defendants' actions in summarily suspending Chalkboard's license to operate a day care center. The defendants moved for summary judgment on grounds of absolute and qualified immunity. The District Court denied the motion and the defendants appeal. We have jurisdiction over this interlocutory

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[1] Hereafter we refer to both plaintiffs as "Chalkboard".

appeal under 28 U.S.C. § 1291. *See Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817, 86 L.Ed.2d 411 (1985), *Kraus v. County of Pierce*, 793 F.2d 1105, 1107-8 (9th Cir.1986), *cert. denied*, 480 U.S. 932, 107 S.Ct. 1571, 94 L.Ed.2d 763 (1987).

We review de novo the denial of defendants' motion for summary judgment. *Kraus v. County of Pierce*, 793 F.2d at 1106-07.

FACTUAL BACKGROUND

On October 10, 1985, the Tucson Police Department received a complaint from a local citizen that her young daughter had been sexually abused while at Chalkboard by a teacher on its staff. The Police notified the Office of Child Protective Services, a unit of DES, and defendant Susan Brandt of DES began an investigation. On the same day, DHS, the agency responsible for licensing and monitoring day care centers, was notified and also initiated an investigation.

During the next several days Brandt learned from interviews with students and one former employee of Chalkboard of at least one other complaint of sexual abuse concerning the same teacher. She also learned of several complaints of physical abuse, including the disciplining of children by tying their hands behind their backs with sheets, placing the children on a high shelf, or locking them in a shed or outside of the center. The former employee testified at a deposition that she had informed the investigators that the incidents of physical abuse had stopped several months prior to the investigation. These accusations were also encountered by two

investigators from DHS, defendants Sherry Meredith and Lucinda Blair. The DHS investigators learned from Hoyt that the teacher accused of the sexual abuse incidents had been suspended pending the outcome of the investigation. While at Chalkboard, the DHS investigators also noted that the day care center was over capacity, a problem of which Chalkboard had already been warned in 1983.

On October 16, 1985, defendant Boyd Dover, Deputy Director of DHS, issued an order summarily suspending Chalkboard's license on the grounds of the alleged sexual molestation, the alleged physical abuse, and overcrowding. On the following day, an administrator of DES stood on the sidewalk in front of Chalkboard to inform parents of the closure and advise them of alternative day care centers. The press was also present at this time. Prior to Chalkboard's closure, approximately 85% of its enrollment was under contract with DES. The license suspension automatically resulted in cancellation of these contracts as well as Chalkboard's Department of Agriculture funding for food programs.

On the day of the suspension, Hoyt was notified of an administrative hearing on the license suspension to be scheduled in the near future. This hearing was subsequently scheduled for October 24, 1985, eight days after the suspension. Immediately after the suspension, however, Chalkboard had filed an action in Arizona Superior Court seeking an injunction. On October 18, at a hearing in state court, Chalkboard sought leave to withdraw the complaint, which was granted. On October 23, 1985, this action was filed. On October 24, Chalkboard appeared at

the administrative hearing and stipulated to a postponement. Ultimately, Chalkboard elected not to attend the hearing.

ABSOLUTE IMMUNITY

Defendants first argue that they are absolutely immune. In general, executive officials are protected only by qualified immunity. *Butz v. Economou*, 438 U.S. 478, 507, 98 S.Ct. 2894, 2911, 57 L.Ed.2d 895 (1977). In certain instances, however, executive officials may be entitled to absolute immunity, but such instances are limited "to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of public business." *Id.* The burden is on the official seeking immunity to show that the immunity is "justified by overriding considerations of public policy." *Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538, 542, 98 L.Ed.2d 555 (1988).

The Supreme Court has made clear that absolute immunity depends upon the particular function performed by the official. *Butz*, 438 U.S. at 508, 98 S.Ct. at 2911. The question is not one of status, but of the "nature of the responsibilities of the individual official." *Cleavinger v. Saxner*, 474 U.S. 193, 201, 106 S.Ct. 496, 500, 88 L.Ed.2d 507 (1985). The prime categories of executive officials that are entitled to absolute immunity are those whose functions parallel the functions of judges and prosecutors. *Butz*, 438 U.S. at 511-15, 98 S.Ct. at 2913-15; *see Schlegel v. Bebout*, 841 F.2d 937, 942 (9th Cir.1988). It is these categories into which defendants seek to fit themselves.

This case arises, however, out of the DHS officials' summary closure of Chalkboard. To the extent that such action may be judicial or prosecutorial, it is essential that this function be assigned by state law to the DHS. A judge who wrongfully sentences an accused to prison is absolutely immune; a policeman who takes it upon himself to perform that function clearly is not. We must therefore examine whether the DHS officials were placed, under state law, in the functions equivalent to those of judge or prosecutor with regard to Chalkboard's summary closure.

The DHS officials contend that they were authorized summarily to close Chalkboard under Ariz.Rev.Stat.Ann. § 41-1064(C)(1988)[2], which states;

> No revocation, suspension, annulment or withdrawal of any license is lawful unless, prior to the action, the agency provides the licensee with notice and an opportunity for a hearing in accordance with this chapter. If the agency finds that public health, safety or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

This provision is part of the Arizona Administrative Procedure Act, which forms a general set of rules applicable to administrative agencies in the absence of a more specific statutory structure. *See Didlo v. Talley,* 21

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[2] This section was formerly codified at Ariz.Rev.Stat.Ann. § 41-1012(c).

Ariz.App. 446, 448, 520 P.2d 540, 542 (1974). Chalkboard contends, and the district court held, that DHS was governed by just such a specific statutory structure that included a provision for obtaining expedited closure of day care centers. Ariz.Rev.Stat.Ann. § 36-886.01 (1986) provides:

> When the department has reason to believe that a day care center is operating under conditions that present possibilities of serious harm to children, the department shall notify the county attorney or the attorney general, who shall immediately seek a restraining order and injunction against the day care center.[3]

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[3] This procedure is considerably more expeditious than the normal license suspension procedure under the same statutory scheme, Ariz.Rev.Stat.Ann. § 36-889. The latter statute provides:

> The department may revoke or suspend the license of any person for a violation of applicable law or regulations. The department shall afford the affected licensee the right of a hearing by serving upon the licensee at least thirty days' notice, by registered mail with return receipt requested, to show cause before the director, upon a date to be fixed in the notice, why the license should not be suspended or revoked in accordance with the regulations of the department and the provisions of law. The notice shall set forth the act or acts constituting the violation and shall refer to the provisions of the applicable law or regulations alleged to be violated. If the licensee does not respond to the written notice within the period provided in the notice, the department shall revoke or suspend the license. If the licensee, within the period provided by the notice, rectifies the acts constituting the violation, the department may withdraw the notice of suspension or revocation.

The district court concluded that the two provisions were in conflict and that Arizona law dictates that statutory conflicts be settled in favor of the more specific statute. *See Arden-Mayfair, Inc. v. Department of Liquor Licenses and Control,* 123 Ariz. 340, 342, 599 P.2d 793, 795 (1979); *Arizona State Tax Commission v. Phelps Dodge Corporation,* 116 Ariz. 175, 177, 568 P.2d 1073, 1075 (1977), *cert. denied,* 434 U.S. 1047, 98 S.Ct. 893, 54 L.Ed.2d 798 (1978). The DHS officials maintain that there was no conflict between Ariz.Rev.Stat.Ann. § 41-1064(C) and Ariz.Rev.Stat.Ann. § 36-886.01, and that DHS was free to use either provision.

While the Arizona Supreme Court has never defined the relationship between the two statutes, its decisions in *Arden-Mayfair,* and *Phelps Dodge,* supra, render the officials' view implausible. We cannot accept the contention that a general purpose summary-closure provision enacted years earlier remains at the disposal of the DHS officials when the state has adopted a more recent and specific statutory scheme which provides for both routine and expedited methods of suspending the license of a day care center and which does not permit summary action by agency officials.

Thus, Arizona has provided, under section 36-886.01, for prosecutors and judges to effect a summary closure of day care centers. It is entirely possible that DHS officials who directly serve that process in one way or another will be absolutely immune. *See Coverdell v. Department of Social and Health Services,* 834 F.2d 758 (9th Cir.1987) (social worker seeking and obtaining a child dependency

order is absolutely immune). But in by-passing the statutorily mandated procedure entirely,[4] and arrogating to themselves a function that state law denies them, defendants have not served in a judicial or prosecutorial capacity that conferred absolute immunity.

Our precedent supports our conclusion that state law must authorize the prosecutorial or judicial function to which absolute immunity attaches. In *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675 (9th Cir.1984), we held a prosecutor to be absolutely immune in releasing certain evidence after trial, pointing out that he acted "well within his authority as a deputy district attorney, empowered to preserve or to release" the evidence. *Id.* at 678. Similarly, in *Coverdell*, we emphasized that the absolutely immune social worker's action in seeking a court order was "not only within the scope of her authority under Washington law, [but] may well have been required." *Coverdell*, 834 F.2d at 764. Here, in summarily closing Chalkboard without a hearing, DHS was not acting in a role assigned to it by state law.[5] The district court was correct in denying absolute immunity.

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[4] *Cf. Meyers v. Contra Costa County Dep't of Social Services*, 812 F.2d 1154, 1157 (9th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 98, 98 L.Ed.2d 59 (1987) (absolute immunity denied to social worker who ordered father away from his home; "[r]ather than contributing to an informed judgment by an impartial decisionmaker as an advocate, [social worker] acted unilaterally prior to the operation of the judicial process").

[5] We thus distinguish cases such as *Horwitz v. Bd. of Medical Examiners*, 822 F.2d 1508 (10th Cir.), *cert. denied*, ___ U.S. ___, 108 S.Ct. 453, 98 L.Ed.2d 394 (1987), and *Austin Municipal*

(Continued on following page)

QUALIFIED IMMUNITY

The fact that state law did not put the defendants in the position of prosecutors or judges does not, however, necessarily deprive them of all immunity. *See Meyers*, 812 F.2d at 1157-58. Executive officials are protected against actions for damages by the doctrine of qualified immunity unless, "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1981).

To determine whether the defendants' claim of qualified immunity should have been sustained, we determine whether the plaintiff alleges a "plain violation of law which has a settled substantive content." *Kraus v. County of Pierce*, 793 F.2d at 1108. Here there is no question whether the alleged deprivation took place. The only question is whether the deprivation constituted a violation of settled rights.

We conclude that Hoyt, as operator of Chalkboard, had a clearly established due process right to a hearing before her license was suspended, at least in the absence of an emergency – a point we discuss later. We note that

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Securities v. Nat'l Ass'n of Securities Dealers, 757 F.2d 676 95th Cir.1985), where members of boards *exercising statutorily delegated authority* to suspend professional licenses summarily were accorded absolute immunity.

defendants do not dispute that Chalkboard's license constitutes an entitlement amounting to a property interest; they only contend that it may be suspended without a pre-deprivation hearing. But the Supreme Court has identified a person's constitutionally protected interest in a continued livelihood as sufficiently strong to require a due process hearing prior to any state deprivation.

> We have described the "root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." This principle requires "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected property in his employment.

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985) (internal citations omitted).

A license may become comparable to an interest in employment where it is clearly linked to a person's ability to earn a living. In *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), the Supreme Court noted with respect to a driver's license that "[o]nce licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood". *Id.* at 539, 91 S.Ct. at 1589. The Court went on to hold that "due process requires that when a State seeks to terminate an interest such as that here involved, it must afford " 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective." *Id.* at 542, 91 S.Ct. at 1591.

While it is not necessary to assume in all cases that a license to operate a day care center is essential to the livelihood of the license holder, the record here supports the conclusion that plaintiff Hoyt was deprived of her ability to carry on in the day care business as a result of the summary suspension of her license.

The defendants point to a number of cases in which the Supreme Court has upheld the summary suspension of licenses without a pre-deprivation hearing[6]. These cases can be distinguished because they differ significantly from the situation here in terms of the "risk of an erroneous deprivation . . . and the probable value, if any, of additional or substitute procedural safeguards." *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976).

In the license cases cited by the defendants the standards for invoking official action were precisely set out, and the evidence required to meet these standards was readily determinable without the participation of the

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[6] In *Dixon v. Love*, 431 U.S. 105, 113, 97 S.Ct. 1723, 1727, 52 L.Ed.2d 172 (1977), the Court upheld an Illinois statute authorizing summary suspension of a driver's license on determination by a state agent that the driver had accumulated a specific number of points meeting a predetermined standard for deprivation. In *Mackey v. Montrym*, 443 U.S. 1, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979), the Court upheld a Massachusetts law that provided for summary suspension of a driver's license where the driver has refused to take a breath-analysis test. In *Barry v. Barchi*, 443 U.S. 55, 65, 99 S.Ct. 2642, 2649, 61 L.Ed.2d 365 (1979), the Court upheld a New York law providing for summary suspension of a horse trainer's license predicated on the chemical testing of horses for which the trainer was responsible.

license holder. In short, they called for the mechanical application of rules in which a hearing is of limited usefulness. In contrast, pre-deprivation hearings are most valuable where the decision is open textured and subject to some discretion. In *Loudermill*, for example, the employee was discharged for having lied about a past criminal conviction. Determining what is a lie as opposed to an honest mistake is a judgment not easily reduced to a formulaic measurement of facts.

> Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decision maker is likely to be before the termination takes effect.

Loudermill, 470 U.S., at 543, 105 S.Ct. at 1494. The decision to suspend the license to operate a day care center is one calling for substantial exercise of judgment.

In determining whether reasonable state officials would have known that their actions violated the constitutional or statutory rights of the plaintiffs, we assume that such officials are aware of available decisional law. *Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir.1986), *cert. denied*, 483 U.S. 1020, 107 S.Ct. 3263, 97 L.Ed.2d 762 (1987). The Supreme Court's decision in *Loudermill* preceded the officials decision to summarily suspend Chalkboard's license by more than six months[7]. That decision established clear due process minima for

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[7] In *Horwitz v. Bd. of Medical Examiners of the State of Colorado*, 822 F.2d at 1517, where the court found qualified immunity for the defendants, the court noted that *Loudermill* was not decided at the time of Dr. Horwitz's suspension from his job without a pre-deprivation hearing.

state actions depriving persons of their livelihood. More than fourteen years earlier, the Supreme Court in *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), had established that the suspension of a license required a pre-deprivation hearing where the license was essential to a person's livelihood. Based on the judicial precedent existing at the time, the defendant officials should have known that they were violating the plaintiffs rights. A grant of summary judgment on the grounds of immunity was not warranted on the undisputed facts and was correctly denied by the district court.

Qualified immunity remains as an affirmative defense to be considered by the ultimate finder of fact. Defendants contend that emergency conditions existed that constitutionally justified summary suspension of Chalkboard's license without a prior hearing[8], or at least that reasonable persons might so have concluded. The facts concerning the presence or absence of an emergency are highly controverted, however. It may be that resolution of that or other disputed matters at trial may validate the defendants' claim of qualified immunity; we express no opinion on that question, of course. All that we hold here is that, on the undisputed facts presented on motion for summary judgment, the defendants failed to show that they were entitled to immunity as a matter of law.

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[8] In a somewhat analogous situation concerning termination of a hospital resident, this court noted that "where patient welfare is in immediate jeopardy or where the effective functioning of the hospital is severely threatened, a hospital might well be justified in immediate termination with the informal hearing procedures held shortly thereafter." *Stretten v. Wadsworth Veterans Hospital*, 537 F.2d 361, 369 n. 20 (1976).

The order of the district court denying defendants' motion for summary judgment is affirmed, and the matter is remanded for further proceedings.

AFFIRMED AND REMANDED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CHALKBOARD, INC., et al., Plaintiffs,	)	NO. CIV-85-948-TUC-RMB
vs.	)	ORDER
LUCINDA BLAIR, et al., Defendants.	)	(Filed Dec. 22, 1987)

This Order contains the Court's rulings on the Plaintiffs' Motion for Summary Judgment, Defendant's Cross Motion for Summary Judgment and Defendants' Motion for Partial Summary Judgment as to Count II.

Plaintiffs' Motion for Summary Judgment/Defendants' Cross-Motion for Summary Judgment

Plaintiffs have filed a Motion for Summary Judgment on the issue of deprivation of due process. Defendants have filed a Cross-Motion for Summary Judgment on the issue of immunity from damages.

Plaintiffs' Motion is based on two arguments: (1) the Defendants' violation of the state statute is a violation of due process because the statutes were designed as procedural safeguards for the protection of child care providers and (2) the failure to provide a pre-termination hearing results in a deprivation of due process because the undisputed facts establish that no emergency existed that necessitated the summary suspension.

Defendants' Motion is based on the argument that the Defendants are immune from damages and that the Eleventh Amendment bars monetary relief in this action.

After a careful review of the record, the Court concludes that a genuine issue of material fact exists regarding whether or not an emergency necessitating summary suspension existed at the day-care center. The Court further concludes that the Plaintiffs' interchangeable use of agency or state for the term "Defendants" is insufficient to establish that the state is the real party of interest. Therefore, the Eleventh Amendment argument is inapplicable. Defendants are not entitled to either absolute or qualified immunity for their actions in this case.

Defendants' Motion for Partial Summary Judgment as to Count II

Count II of Plaintiffs' Complaint is the state law claim of violation of A.R.S. § 36-886.01. The basis of this Court's jurisdiction over this state law claim is the doctrine of pendent jurisdiction.

In Defendants' Motion for Partial Summary Judgment as to Count II, the Defendants argue that if this Court grants the Defendants' Motion for Summary Judgment as to the 42 U.S.C. § 1983 federal claim, then the Court would lose its jurisdiction over the pendent state claim. *United Mines Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130 (1966).

Since the Defendants' Motion for Summary Judgment as to the federal claim has been denied, the doctrine of pendent jurisdiction still provides as basis for this Court's jurisdiction over the state law claim.

Therefore, IT IS ORDERED that Plaintiffs' Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED that Defendants' Motion for Partial Summary Judgment as to Count II is DENIED.

In a June 22, 1987 Minute Entry this Court stated "IT IS FURTHER ORDERED that Discovery Deadline is EXTENDED to September 4, 1987 at 5:00 P.M. Compliance with Local Rule 42 is EXTENDED to TWO (2) Weeks after the Court has ruled on the Plaintiff's Motion for Summary Judgment." *Chalkboard v. Blair, et al.*, CIV-85-948, Minute Entry (Filed June 22, 1987).

Therefore, IT IS FURTHER ORDERED that the parties shall comply with Local Rule 42 by filing their joint proposed order by 5:00 P.M., January 11, 1988.

DATED: December 22, 1988.

/s/ Richard M. Bilby
Richard M. Bilby
United States District Judge

APPENDIX D

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution, Section One:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Arizona Revised Statutes, § 36-886.01:

> When the department has reason to believe that a day care center is operating under conditions that present possibilities of serious harm to children, the department shall notify the county attorney or the attorney general, who shall immediately seek a restraining order and injunction against the day care center.

Arizona Revised Statutes § 41-1064(C)

No revocation, suspension, annulment or withdrawal of any license is lawful unless prior to the action, the agency provides the licensee with notice and an opportunity for a hearing in accordance with this chapter. If the agency finds that the public health, safety or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

(3)

No. 90-270

In The

Supreme Court of the United States

October Term, 1990

SUSAN BRANDT; BOYD DOVER; LUCINDA BLAIR; ANDY HARCLERODE; SHERRY MEREDITY; LLOYD NOVICK; DOUGLAS X. PATINO AND DARWIN COX,

Petitioners,

v.

CHALKBOARD, INC.; KAREN M. HOYT,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

STATUTES

STATEMENT OF THE CASE

Several facts pertinent to the issues in this case and omitted from the Petition are set forth herein. Upon the arrival at the Chalkboard Preschool on October 10, 1985, all of the investigators were advised that the man accused of sexual abuse had been suspended from the Center and would be excluded from the facility during the investigation. The young man accused of these offenses was married with children and had worked at the Center for two years. He had no criminal record and denied the allegations in this case. He also offered to take a polygraph examination. The truth of these allegations was highly doubtful. Petitioner Boyd Dover may not have known that the man accused of sexual misconduct had been excluded from the Center at the time he signed the closure order.

Physical abuse was not approved of or authorized as a form of discipline at the day-care center. In fact, the director and assistant director of Chalkboard had instructed the staff that the only appropriate discipline was a brief period of "time out" for not more than five (5) minutes. The investigators were advised the alleged physical abuse had been reported to the owners of the Chalkboard and that immediately thereafter all such incidents had ceased. The evidence demonstrated that any alleged physical abuse ended approximately two months prior to the investigation.

On October 11th, agents of the Department of Health Services began drafting the Summary Suspension Order. The final Order was served on October 16, 1985. No one ever advised Karen Hoyt or anyone from the Chalkboard

about the allegations of physical abuse until she received notice in the Summary Suspension Order.

As to the allegation of overcrowding, the Governor's Task Force on day-care centers had indicated that there was a need for many more day-care centers in Arizona. This problem had existed at the Chalkboard even before Karen Hoyt acquired the school in 1983. Officials of Child Protective Services and Department of Health Services were aware of the excess children and knew that it did not pose a serious threat or necessitate an emergency closure of the school.

Overcrowding occurred when parents who worked a day shift could not pick up their children until after 5:00 p.m. but parents who worked an afternoon shift needed to drop off their children between 3:30 p.m. and 5:00 p.m. Excess children were only present from approximately 3:30 p.m. until 5:30 p.m. Karen Hoyt was trying to acquire additional space to resolve the situation. In addition, no excess children were allowed at the school at any time after October 11, 1985. Two days before the Summary Suspension Order was issued, Department of Health Services investigators made an inspection and found no excess children at the center.

According to uncontroverted testimony by both Karen Hoyt and an expert in the field of day-care, once the allegations of sexual abuse at the day-care center and the closure of the day-care center occurred, Respondent's livelihood was destroyed. Once these allegations were publicized, the Center closed and the children removed

from the facility, no subsequent action could have resurrected Respondents' business.

SUMMARY OF THE ARGUMENTS PRESENTED

1. The Ninth Circuit's opinion is entirely consistent with *Davis v. Scherer*. The opinion below holds that even if there is a violation of Arizona state law, Petitioners would nonetheless be entitled to summarily close Respondent's business if an emergency existed. This holding is entirely consistent with this Court's opinion in *Davis v. Scherer*, holding that the violation of a state's statute does not preclude an official from a grant of qualified immunity.

2. The Ninth Circuit correctly applied the *Mathews v. Eldridge* test in concluding that based on the significant private interest at stake, the high risk of an erroneous deprivation, and the burdens that additional procedures would entail for the state, due process would require some sort of pre-deprivation hearing absent an emergency. This opinion is consistent with opinions of this and other Courts.

3. There is no conflict between the Ninth Circuit's opinion and the decision of the Tenth Circuit or the Nebraska Supreme Court. The Nebraska Supreme Court held simply that in an emergency situation, the summary closure of a day-care center would be permissible. The Tenth Circuit opinion was actually an opinion by the District Court of New Mexico that held that there was no protected property interest under New Mexico law in a

day-care center's license. The ruling was affirmed without an opinion by the Tenth Circuit. Both cases are entirely consistent with the opinion below.

4. Petitioners' argument that an administrator's subjective belief that there is an emergency should never be challenged as to its objective reasonableness is contrary to this Court's opinion in *Harlow v. Fitzsimmons* and its progeny.

5. The law establishing that absent an emergency, some sort of pre-deprivation hearing is required before an individual's livelihood is destroyed is well established in the law. Respondent's license was her livelihood and also provided a livelihood for all of the employees of the day-care center.

REASONS FOR DISALLOWANCE OF THE WRIT

I. THE OPINION OF THE COURT OF APPEALS IN NO WAY CONFLICTS WITH THIS COURT'S HOLDING IN *DAVIS V. SCHERER* AS IT DOES NOT PRECLUDE PETITIONERS FROM TAKING ADVANTAGE OF QUALIFIED IMMUNITY DESPITE THEIR VIOLATION OF AN ARIZONA STATUTE

A. The Ninth Circuit opinion holds that despite a violation of Arizona state law, Petitioners may be entitled to qualified immunity and the opinion does not conflict with *Davis v. Scherer.*

In *Davis v. Scherer,* 468 U.S. 183 (1984), this Court held that the fact that a government official violates a state statute or regulation does not preclude that official from raising a claim of qualified immunity. The opinion below

does nothing to disturb this ruling. The Ninth Circuit did not preclude Petitioners from raising the defense of qualified immunity. Despite the violation of an Arizona statute, the Ninth Circuit held that the Petitioners would be entitled to qualified immunity if an emergency necessitated postponement of the hearing. *Chalkboard v. Brandt*, 902 F.2d 1375, 81 & n.6 (1990). The opinion below held only that the Petitioners were not entitled to qualified immunity as a matter of law and upheld the District Court's denial of Petitioner's motion for summary judgment. In short, contrary to the Petitioners' assertions, the Ninth Circuit recognized that the Petitioners would in fact be entitled to qualified immunity if an emergency existed precluding a pre-deprivation hearing.

The Arizona statutory scheme was considered by the Ninth Circuit for a very limited purpose.[1] In determining what process is due, *Mathews v. Eldridge*, 424 U.S. 319 (1976) requires that three factors be considered, the private interest affected, the risk of erroneous deprivation through the procedures used and the value of additional procedures, and the government's interest including the burden that additional procedures would entail.

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[1] Arizona Revised Statute § 36-886.01 states "When the department has reason to believe that a day-care center is operating under conditions that present *possibilities of serious harm to children*, the department shall notify the county attorney or the attorney general, who *shall* immediately seek a restraining order and injunction against the day care center." (Emphasis added). Although this issue has not been raised, the Arizona case law, legislative history, and readings of the statutes make clear that the legislature did not intend the Petitioners to have the ability to summarily close an institution.

As to the final prong of *Mathews*, the Court of Appeals looked to the statutory scheme spelled out by the Arizona legislature to evaluate the "burdens that the additional or substitute procedural requirement would entail". *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The Court of Appeals concluded that because the legislature had provided a swift procedural means of obtaining a closure of a day-care facility, the State had considered the burdens involved in these procedures and the procedures had been accepted as not too burdensome.

Petitioners' first argument for granting the Petition for Writ of Certiorari is that the Court of Appeals violated the holding of *Davis v. Scherer*, supra. The opinion below did nothing of the sort. The opinions are wholly reconcilable and the Petition should not be allowed.

B. The requirement that an emergency situation exist before the Government forgoes a pre-deprivation hearing is rooted not in the Arizona statutes but in long standing constitutional case law.

Petitioner claims that the Court of Appeals relied on the violation of an Arizona statute to find a federal due process right. Petition at page 9. Specifically, Petitioners have alleged that the Court of Appeals' Opinion allows "federal due process rights to be enlarged or circumscribed by the vagaries of individual state legislatures". *Id.* This is simply not a correct assessment of the opinion below.

The notion that traditional procedural requirements of due process can be abated in emergency situations has

long been recognized by this Court. This Court has recognized that "it is fundamental that *except in emergency situations* . . . due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes affected". *Bell v. Burson*, 402 U.S. 535, 542 (1971) (emphasis added).

This rule of due process has been reiterated by this and other Courts. *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 300 (1981) ("[S]ummary administrative action may be justified in emergency situations."); *Parratt v. Taylor*, 451 U.S. 527, 541-43 (1981); *Patterson v. Coughlin*, 761 F.2d 886, 892 (2nd Cir. 1985); *Harden v. Adams*, 760 F.2d 1158, 1167 (11th Cir. 1985); *Miranda v. Southern Pacific Transportation Company*, 710 F.2d 516, 522 (9th Cir. 1983).

The opinion below recognized that this doctrine is rooted not in Arizona statutes but in constitutional law in the citation of *Stretten v. Wadsworth Veterans Hospital*, 537 F.2d 361, 369 & n.20 (9th Cir. 1976). *Chalkboard, Inc. v. Brandt*, 902 F.2d 1375, 1381 & n.6 (9th Cir. 1990)

Petitioner's argument that the opinion below conflicts with other circuits is also incorrect. The cases cited in the Petition at pages 11-12 stand for the proposition that a violation of state statute or regulation does not deny an official from claiming qualified immunity. As previously noted, nothing in the opinion below conflicts with this rule of law.

One case cited by Petitioner is closely analogous to the case at bar. In *Robison v. Via*, 821 F.2d 913 (2d Cir.

1987), the Court addressed the question of when due process permitted children to be removed from their parents without a pre-deprivation hearing. The Court of Appeals stated that it was "well established that officials may temporarily deprive a parent of custody in 'emergency' circumstances without parental consent or a *prior* court order' ". 821 F.2d at 921. See also *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 848 (1977); *Doe v. Staples*, 706 F.2d 985 (6th Cir. 1983).

In conclusion, the due process right to notice and opportunity to be heard before losing your livelihood absent an emergency does not arise as a result of an Arizona statute but rather as a result of long standing constitutional law. The Arizona statutes were only evidence that, according to the Arizona legislature, even in emergency situations, some procedural safeguards would not be unduly burdensome.

II. THE NINTH CIRCUIT CORRECTLY APPLIED THE *MATHEWS v. ELDRIDGE* BALANCING TEST IN CONCLUDING THAT SOME SORT OF PRE-TERMINATION HEARING WAS REQUIRED ABSENT AN EMERGENCY.

Petitioners' second argument is that the Ninth Circuit concluded that due process required a pre-termination hearing prior to an emergency license suspension. This is simply inaccurate. The Ninth Circuit held that no such pre-termination hearing would be required in the case of an emergency. The Ninth Circuit did, however, rule that a question of fact existed as to the existence of an emergency in this case.

Therein lies the heart of Petitioners' argument. Petitioners maintain that the category of children's welfare itself should, in all cases, constitute an emergency. 902 F.2d at 1381. Petitioners maintain that if an administrator has unreasonably concluded that there is an emergency, the failure to provide notice and opportunity to be heard before a person's livelihood is destroyed should nonetheless be proper.

The Court of Appeals noted

> "the defendant contended that the summary suspension did not violate procedural due process because swift action was needed to protect the welfare of children. The state's interest in protecting children is undeniably great. Chalkboard strongly disputes, however, the existence of an emergency, and the facts are sufficiently in dispute to preclude resolution of that issue on summary judgment." 902 F.2d at 1381 (footnote omitted).

The District Court previously denied Petitioners' motion for summary judgment on the grounds of qualified immunity because "the issue of whether an emergency existed was a material issue of fact to be tried". Petition at pages 5-6.

This holding is consistent with long established constitutional decisions. In *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264, 299-300 (1981) this Court recognized

> "Our cases have indicated that due process ordinarily requires an opportunity for 'some kind of hearing' prior to the deprivation of a significant property interest . . . The Court has often

> acknowledged, however, that summary administrative action may be justified in emergency situations." (Citations omitted)

See *Parratt v. Taylor*, 451 U.S. 527, 540 (1981); *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972).

Balancing the interest as required by *Mathews v. Eldridge*, 424 U.S. 319 (1975) mandates this conclusion. The interest of the Respondents is obviously significant. Karen Hoyt, as the owner and shareholder of a corporation licensed by the State, clearly had a protected property interest. The fact that Respondents' business assumed a corporate form does not deprive Respondent of the right to due process. *Metropolitan Life Insurance Company v. Ward*, 470 U.S. 869, 881 n.9 (1985). Petitioners argue that the fact that the owner may have depended on the license for her livelihood is irrelevant and that the State should not distinguish between a business that is owned by an individual and a well financed corporation. Petition at page 14.

Petitioner fails to correctly perceive the situation. The license for the Chalkboard day-care center provided a livelihood not only for the owner of the Chalkboard but for its employees as well. The school provided employment for Karen Hoyt and for its employees. The school was also an enormous investment of time and money for Karen Hoyt who assumed the risk of an entrepreneur. As the Court of Appeals correctly pointed out, Respondent's license in this case was issued and was essential to her

pursuit of a livelihood. 902 F.2d at 1381 citing *Bell v. Burson*, 402 U.S. 535, 539 (1971).[2]

The second prong of the *Mathews* test also weighs heavily in Respondent's favor. The risk of erroneous deprivation is extremely high here. By its very nature, allegations of abuse made by toddlers are suspect. A touching on the buttock can be the simple act of pushing a child on a swing. The communication skills of preschool children are not highly developed. In addition, suggestive or ambiguous questions by zealous investigators may lead to inaccurate statements by children. A toddler's ability to accurately perceive or remember may also be suspect. In the event that the deprivation turns out to have been erroneous, the harm is irreparable. As the Ninth Circuit correctly pointed out, the failure to give Respondents notice of the allegations against them and a chance to respond made the risk of error "considerable".

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[2] Petitioner argues that day-care centers are somehow to be treated separately from other businesses because they are "pervasively regulated". *Heckler v. Day*, 467 U.S. 104 (1984) does not support Petitioners' position in this case. In *Heckler*, the lower court had imposed a time limit within which the administrative agency would be required to decided motions for reconsideration for governmental disability claims. In reversing the lower court, this Court recognized that the congressional scheme refused to impose such a deadline and found that because of the "unmistakable intention of Congress, it would be an unwarranted judicial intrusion into this pervasively regulated area for federal courts to issue injunctions imposing deadlines . . . ". 467 U.S. at 119. In the instant case, Petitioners violated an Arizona statute requiring some minimal procedural protection be afforded to Respondents before the closure was made.

902 F.2d at 1381; *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543 & n.8 (1985).

Petitioners state as a fact that if a summary suspension had been judged erroneous eight days after the order had been issued, the state contract would have been reinstated and the majority of Chalkboard pupils would have been replaced there. Petitioners also claim that this would have largely reduced the financial loss to Respondents. No support exists for this claim in the record. In fact, in the Petition for Rehearing filed in the Ninth Circuit, Petitioners argued that it was "reasonable to assume" that the children would be placed back into the Center. Such an assumption is hardly reasonable.

The undisputed facts indicate the contrary. According to Karen Hoyt and an independent expert in the field of day-care, once these allegations of child abuse were publicized, the school closed and children sent away, the damage to the school was irreparable. Common sense requires this same conclusion. When child abuse allegations are publicized and a school shut down, the damage to the school can never be undone. This holds true regardless of whether the school is a well financed corporation or a sole proprietorship.

The final prong of the *Mathews* test is the burden placed on the State. The District Court and the Court of Appeals recognized that the Arizona legislature provided an expeditious procedure wherein the Petitioner could obtain quick injunctive relief to shut down a school when there was even a "possibility" of serious danger. A.R.S. § 36-886.01. However, the District Court and the Court of Appeals went beyond the provisions set forth in the

statute and held that if an emergency existed, due process would allow that State to forego all pre-deprivation procedures.

Petitioners want the mere allegation of danger to children to be sufficient to justify destroying a business without any sort of notice and opportunity to be heard. Respondents have never argued for a full evidentiary hearing prior to the closure. However, in the instant case, Respondent was not advised of the allegation of physical abuse until she was served with the summary closure order. As for the allegation of sexual molestation, Respondent immediately suspended the accused employee. Petitioners began drafting the summary closure five days before it was issued. The accused had been removed from the campus. No emergency existed. Obviously, in this case, Petitioners must argue that the mere category of threat to children is sufficient to destroy a business without a pre-deprivation hearing as no exigency existed to justify dispensing with traditional due process procedural protection.

Petitioners' reliance on the opinions in *Ewing v. Mytinger & Casselbery*, 339 U.S. 594 (1950); *Fahey v. Malonee*, 332 U.S. 245 (1947); and *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) is misplaced. Each of these cases is consistent with the opinion below. In construing the opinions of *Ewing*, *Fahey* and *North American Cold Storage*, this Court has stated that these were instances where "there has been a special need for very prompt action". *Fuentes v. Shevin*, 407 U.S. 67 (1972). This Court has recognized the *Ewing* and *North American Cold Storage* opinions as "the type of emergency situation in which this Court has found summary administrative

action justified". *Hodel v. Virginia Surface Mining & Reclamation Association, supra,* 452 U.S. at 301.

However, in situations pertaining to an individual's livelihood, this Court has held:

> "We have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest . . . This principal requires 'some kind of a hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment." *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 542 (1985). (Citations omitted)

While there may be exceptions in true emergency situations, *Cleveland Board of Education v. Loudermill,* supra, 470 at 544-545, the simple allegation of an urgent need does not eradicate all meaningful due process protection.

Petitioners also state that the Court of Appeals ignored this Court's opinion in *Dixon v. Love,* 431 U.S. 105 (1977), *Mackey v. Montrym,* 443 U.S. 1 (1979) and *Barry v. Barchi,* 443 U.S. 55 (1979). The Court of Appeals did not ignore these decisions. 902 F.2d at 1381. In each of those cases, the factual questions to be resolved were susceptible of reasonably precise measurement by external standards. *Id.* The risk of error in those cases was not great. However, in the instant case as the Court below correctly noted, a wide variety of information including witness credibility, veracity, interviewing technique, misinterpretation of children's communication all would have been relevant.

In conclusion, Petitioner's allegation that the Court of Appeals' decision misapplied *Mathews v. Eldridge* is simply incorrect. The Ninth Circuit recognized that in a true emergency situation, even the pre-deprivation procedures required by the Arizona statutes can be dispensed with. Petitioners' argument that whenever there is an allegation of an urgent need, regardless of whether there is any basis for the allegation, a pre-deprivation hearing will always be too burdensome is contrary to law. Due process requires some kind of notice and opportunity to be heard when a serious deprivation of a property interest is about to take place absent some exigency. When a licensee has invested time and capital into a new business, notions of fundamental fairness require nothing less.

III. THE NINTH CIRCUIT'S OPINION THAT PRE-TERMINATION HEARINGS ARE REQUIRED ABSENT AN EMERGENCY IS ENTIRELY CONSISTENT WITH THE LAW AS SET FORTH BY BOTH THE NEBRASKA SUPREME COURT AND THE DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO.

In *Dieter v. State Department of Social Services*, 228 Neb. 368, 422 NW 2d 560 (1988), the director of the Department of Social Services, revoked a license of a day-care center and set a post-deprivation hearing. The closure was done pursuant to a statute which expressly authorized the director to revoke the license of a day-care center when "an emergency exists requiring immediate action to protect the physical well-being and safety of a child in an early childhood program . . . ". Neb. Rev. Stat. §71-1915(3) cited at 422 NW 2d at 563. The Nebraska

legislature expressly provided the director authority to take this action.

The center alleged "that the director could not have determined that an emergency existed . . . ". 422 NW 2d at 565. After conducting a de novo review of the evidence, the Nebraska Supreme Court concluded that there "was a sufficient basis to support the director's emergency order under §71-1915(3)". 422 NW 2d at 565. This holding is entirely consistent with the Ninth Circuit's holding that in the event of an emergency, due process would not require notice and opportunity to be heard prior to the closure of Respondent's business.

In *Rice v. Vigil*, 642 F.Supp. 212 (D.N.M. 1986), the District Court held that under New Mexico law, the day-care center had no protected property interest in her day-care license. In *Rice*, the plaintiff conceded that all of her contracts "were terminable at will". 642 F.Supp. at 215. The District Court concluded that the Plaintiff did not therefore have a "legitimate claim of entitlement" to continuing to supply day-care services, and that she had no protected property interest in her license. 642 F.Supp. at 215. The language quoted in the Petition is dicta stating that there would be no due process violation under the facts of that case "even if a legitimate property interest had existed". The Tenth Circuit affirmed the decision of the District Court without rendering an opinion. 854 F.2d 1323 (10th Cir. 1989).

Other than the possible dicta of a District Court in New Mexico, the courts throughout the country are entirely consistent in holding that before a significant

property interest can be destroyed, there must be some sort of a pre-deprivation hearing.

This rule of due process has frequently been reiterated by the Courts. *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 300, 101 S.Ct. 2389 (1981) ("Summary administrative action may be justified."); *Gun South, Inc. v. Brady*, 877 F.2d 858, 867 (11th Cir. 1989); *Harden v. Adams*, 760 F.2d 1158, 1167 (11th Cir. 1985); *Miranda v. Southern Pacific Transportation Company*, 710 F.2d 516, 522 (9th Cir., 1983). In *Patterson v. Coughlin*, 761 F.2d 886, 892 (2nd Cir. 1985), the Court noted that "absent some exigency that requires summary action by the state or circumstances that render a pre-deprivation hearing impossible as a practical matter, the opportunity to be heard *before* the state deprives an individual of life, liberty or property is still the 'root requirement' of the due process clause." The *Patterson* court quoted from *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985). The *Loudermill* court stressed in no uncertain terms the due process requirement of pre-deprivation hearings.

The interests of children must be protected. However, the fact that the interests of children are involved does not justify dispensing with long cherished principals of due process. *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 848 (1977); *Doe v. Staples*, 706 F.2d 985 (6th Cir. 1983); *Penaranda v. Cato*, 1990 W.L. 90386, ___ F.Supp. ___ (S.D. Ga. 1990), (Revocation of a day-care center license does not require stringent application of procedural due process requirements in an emergency situation.) See also *Roe v. Conn*, 417 F.Supp. 769, 778 (M.D. Ala. 1976).

Petitioners argue that it makes no difference if the allegation of abuse at the center concerned incidents ongoing at the time of the summary suspension or if they occurred months or even years earlier. The urgency of the situation apparently has no bearing on the strength of the government's interest according to Petitioners. No support exists for Petitioners' claim that absent an emergency, it was lawful to close the Respondent's business without some sort of pre-deprivation hearing. Petitioners' argument that this Court should now adopt this standard is a request for a radical change in longstanding constitutional law, and it should be rejected.

IV. PETITIONERS' ARGUMENT THAT A BUSINESS SUMMARILY CLOSED WITHOUT SOME KIND OF HEARING BECAUSE OF A CLAIMED EMERGENCY SHOULD NEVER BE SUBJECT TO REVIEW IS CONTRARY TO THE DECISIONS OF THIS COURT.

In this argument, the Petitioners recognize that the opinion below permits a summary closure in the event of an emergency. However, Petitioners argue that this holding is improper because whether there is probable cause to believe that an emergency exists should not be subject to either a pre-termination hearing or a subsequent judicial review. Petition at page 22. Petitioners' suggestion is frightening. The notion that an administrative official can decide that there is an emergency and close down a business and never be subjected to a review of the reasonableness of the decision is repugnant to our system of justice. It conflicts with the holdings of this Court and other federal courts throughout the land.

In *Anderson v. Creighton*, 483 U.S. 635 (1987), this Court considered the issue of qualified immunity in a civil rights action based on an alleged unlawful search and seizure. In that case, the District Court granted summary judgment for Anderson on the grounds of qualified immunity holding that the undisputed facts established probable cause and that exigent circumstances justified his failure to obtain a warrant. The Court of Appeals reversed the ruling. In its review as to the issue of probable cause and exigent circumstances, this Court reviewed the facts to determine whether reasonable officers could have believed that their conduct was lawful. This Court held that the "determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination of the information possessed by the searching officials". 438 U.S. at 641. In *Anderson*, the specific question to be answered was "whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed." 483 U.S. at 641.

In *Graham v. Connor*, ___ U.S. ___, ___ S.Ct. ___, 104 L.Ed.2d 443 (1989), this Court considered a §1983 claim alleging excessive use of force. This Court recognized that "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them . . . ". 104 L.Ed.2d at 456. In addition, this Court recognized that "in assessing the credibility of an officer's account of the circumstances that prompted the use of force, a fact-finder may consider, along with other factors, evidence that the officer

may have harbored ill-will toward the citizen." 104 L.Ed.2d at 457 & n.12. *Anderson* and *Graham* make clear that the reasonableness of the official's action is judged based on all the facts and circumstances known to the official. The standard is not one of the subjective good faith of the official, but rather the objective reasonableness of his or her action. 483 U.S. at 641.

Courts have correctly applied this test in cases similar to the case at bar. In *Robison v. Via*, 821 F.2d 913 (2d Cir. 1987), cited by the Petitioner, the §1983 complaint alleged that the defendant deprived Robison custody of her two children in violation of her due process rights. The complaint arose out of an allegation that Robison's young daughter had been sexually abused by Robison's husband. The Court recognized that it was "well established that officials may temporarily deprive a parent of custody in 'emergency' circumstances 'without parental consent or a *prior* court order'." 821 F.2d at 921. The *Robison* court concluded "that the record established the qualified immunity of *Via* and *Harrison* because it was objectively reasonable for them to believe they violated no federal rights when they seized the children." 821 F.2d at 921. In reviewing the record, the *Robison* court concluded that there was ample evidence to establish an "objectively reasonable" basis for the defendants to believe that an emergency existed. 821 F.2d at 922. See further discussion *infra* at pages 27-29.

The scope of review for the existence of exigent circumstances and the scope of review for the existence of probable cause in the context of qualified immunity is the same. Are the facts such that a reasonable officer could

reasonably have believe that his or her actions were lawful, *i.e.*, that he or she had probable cause or that exigent circumstances did exist? *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986); *Bigford v. Taylor*, 896 F.2d 972, 975 (5th Cir. 1990); *Bennett v. City of Grand Prairie, Texas*, 883 F.2d 400, 408-09 (5th Cir. 1989); *Henry v. Perry*, 866 F.2d 657, 659 (3rd Cir. 1989); *Calamia v. City of New York*, 879 F.2d 1025 (2nd Cir. 1989); *Walsh v. Franco*, 849 F.2d 66, 69-70 (2nd Cir. 1988); *Clark v. Evans*, 840 F.2d 876, 881-882 (11th Cir. 1988).

The notion that an official's determination of an emergency is not subject to a review in terms of its reasonableness has never been adopted by any court. A suggestion that an official's determination of exigent circumstances should occur with impunity is all the more disturbing in a case such as this where there are subjective determinations to be made, including evaluations of the perceptions and memories of small children, evaluations of the interrogation techniques used with toddlers, problems inherent in communicating with toddlers and the vast discretion that the administrative official has in determining the proper action, if any, to be taken against a center.

Cases cited by Petitioners, taken in context, do not support their claim. Petitioners' quote from this Court's opinion in *Skinner v. Railway Labor Executives Association*, ___ U.S. ___, 109 S.Ct. 1402, 1419 n.9 (1989) is misleading. The quote claims that this Court disapproved of *post hoc* evaluations because a court can always imagine alternative means by which objectives of the government may be

accomplished. However, this footnote pertained to a challenge to an administrative regulation promulgated pursuant to the Federal Railway Safety Act of 1970. The respondent in *Skinner* argued that there were less drastic means to detect employees impaired by drugs without the blood and urine tests required by the regulation. This Court refused to second guess legislation drafted by the agency.

The Petitioner's reliance on *Mackey v. Montrym*, 443 U.S. 1 (1979) is also misplaced. *Mackey* dealt with a suspension of a driver's license based on a refusal to take a blood alcohol test. As this Court noted in its decision

> "[a]s was the case in *Love*, the predicates for a driver's suspension under the Massachusetts scheme are objective facts either within the personal knowledge of an impartial government official or readily ascertainable by him".

Petitioner cites *Turner v. Safley*, 482 U.S. 78, 89 (1987), *Black v. Romano*, 471 U.S. 606 (1985); and *Baker v. McCollan*, 443 U.S. 137 (1979) for the proposition that the Court should not be allowed to second-guess an administrative judgment as to the existence of an emergency. Respondents do not seek a reviewing Court to second-guess an administrator, or to substitute its judgment for that of the administrator. However, a Court must be permitted to review the facts known to the administrator to determine if there was any reasonable basis for the administrator to conclude that there was an emergency necessitating the closure of a business without any prior opportunity to be heard.

Petitioners make a broad claim that the holding below will nullify this Court's opinion in *Ewing v.*

Mytinger and Casselbery, supra; Fahey v. Williams, supra; North American Cold Storage v. Chicago, supra; Dixon v. Love, supra; Mackey v. Montrym, supra; and *Barry v. Barchi, supra.* In *Ewing,* a federal statute was challenged as being unconstitutional. No issue was raised in that case as to whether the facts were sufficient to allow a determination of probable cause or emergency circumstances. Similarly, in *Fahey v. Malonee,* the challenge was made to the constitutionality of a statute. No claim was ever litigated as to the factual basis for the administrator's conduct. In *North American Cold Storage Company v. Chicago,* a municipal ordinance was challenged as unconstitutional. There was no litigation as the factual basis for the City of Chicago's action. Similarly, in *Dixon v. Love, Mackey v. Montrym* and *Barry v. Barchi,* the constitutionality of the procedure itself was challenged not the factual basis for the administrative decision to invoke the procedure. *Montrym* challenged whether the language of the statute was "void on its face as violative of the Due Process Clause . . . " *Mackey v. Montrym,* 443 U.S. at 3. *Love* challenged a statute allowing the summary suspension of a driver's license based on an individual's convictions for traffic offenses. *Dixon v. Love,* 431 U.S. at 107. *Barchi* challenged a statute allowing the summary suspension of a license based on the results of a drug test. In every case, the factual basis for the administration's decisions was never challenged as unreasonable.

Clearly, a review of the facts known to the official to determine if there was an objectively reasonable basis for the belief that this conduct was lawful underlies this Court's holdings regarding the standard for qualified immunity from *Harlow v. Fitzsimmons,* 457 U.S 800 (1982)

to the present. Petitioners' argument that the subjective belief of the administrator that an emergency situation existed is not subject to review is unsupported in the law.

V. AT THE TIME OF THE CLOSURE, IT WAS CLEARLY ESTABLISHED THAT ABSENT AN EMERGENCY, SOME SORT OF NOTICE AND OPPORTUNITY TO BE HEARD WAS REQUIRED PRIOR TO THE CLOSURE OF RESPONDENTS' BUSINESS.

The law requiring some sort of pre-deprivation hearing unless an emergency exists is clearly established. The "clearly established" test of qualified immunity does not require that a case identical to the instant one have been decided previously. As this Court has stated

> "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in the light of the pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). (Citations omitted)

Undoubtedly, novel situations not yet resolved can and must form the basis of a §1983 claim. Cf. *Brower v. County of Inyo*, ___ U.S. ___, 109 S.Ct. 1378 (1989).

The opinion below relied on this Court's opinion in *Cleveland Board of Education v. Loudermill, supra. Loudermill* concerned the termination of a school district employee. In that case, this Court reiterated the long standing doctrine that public employees having a property interest in

continued employment could not be deprived of that right by the state without a pre-deprivation hearing. Although a post-termination hearing was scheduled and the employee could have been reinstated with back pay, this Court held that due process "requires 'some kind of a hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment . . . . As we pointed out last Term, this rule has been settled for some time now." *Cleveland Board of Education v. Loudermill*, 470 U.S. at 542 (citations omitted).

In the instant case, the record before the District Court was undisputed. The closure of a day-care center amidst allegations of sexual molestations would irreparably harm the day-care center and no post deprivation hearing could remedy the damage. The impact of the action in this case was far greater than the action of the *Cleveland Board of Education*. In the instant case, the State's action not only destroyed the livelihood of Karen Hoyt, who invested her time, energies and resources into the business, but also destroyed the livelihood of every employee working at the center.

In situations where a parent is alleged to be abusing a child, a far greater risk to the child exists than that posed in the instant case. Unlike a situation in a day-care center where, as here, an employee accused of wrongdoing can be suspended and kept away from children during an investigation, no such action can be taken with a parent. The threatening parent has access to the child twenty-four hours a day. Nevertheless, courts have long recognized that in situations where it is alleged that a parent is a threat to a child, a temporary removal of the child from the home without a hearing or court order is justified

only when there is an emergency. *Robison v. Via*, 821 F.2d 913 (2nd Cir. 1987). Although the *Robison* case was decided after the Petitioners' closure of the Respondents' business, prior cases also reached this same conclusion. See *Lossman v. Pekarske*, 707 F.2d 288 (7th Cir. 1983); *Duchesne v. Sugarman*, 566 F.2d 817, 825-26 (2nd Cir. 1977) The same holding has been applied to foster parents. See *Smith v. Organization of Foster Families for Equality & Reform, supra*. Similar conclusions have been reached in licensing situations including day-care centers. *Bell v. Burson, supra,* (driver's license); *Penaranda v. Cato, supra.* (day-care license).

The decision of the Ninth Circuit that a pre-deprivation hearing was necessary absent an emergency before the Petitioner could close the Center is entirely consistent with this case law. Immediately upon learning of the allegation of sexual abuse, Karen Hoyt suspended the accused teacher. In public employment situations where keeping an employee is a significant hazard, this Court has suggested this very procedure. *Cleveland Board of Education v. Loudermill*, 470 U.S. at 544-545. Moreover, all of the investigators for the State knew that the suspected employee had been suspended when their investigation began.

Clearly, the interests of children must be protected. In an emergency situation, there can be no hesitation to remove children from a threatening scene. However, when there is no reasonable basis for a claimed emergency, the balancing of interests inevitably leads to the conclusion that some sort of hearing must be granted before a business can be destroyed.

No case law supports Petitioners. Petitioners claim that *Dieter v. State Department of Social Services, supra* and *Rice v. Vigil, supra,* are "prior reported decisions" that demonstrate no clearly established right. On the contrary, both of these cases were decided years after the closure in this case and are entirely consistent with the Ninth Circuit's opinion. See previous discussion, *supra* at pages 15 to 18.

Finally, the statutory scheme set forth by the Arizona state legislature specified an expeditious injunctive procedure to be followed when there was even a possibility of danger to children. Petitioner was well aware that he did not have the authority to issue a closure order. To that extent, the Ninth Circuit opinion goes far beyond the powers provided by the Arizona state legislature in allowing an ex parte closure in the event of an emergency despite the fact that the statutory scheme does not so provide.

In conclusion, the due process right of a pre-deprivation hearing where one's livelihood is jeopardized, absent an emergency, is clearly established. Given the large risk of error, the significant private interest involved for Respondents and their employees, and the foregoing case law, Petitioners' due process rights were quite clearly established at the time of the closure.

VI. CONCLUSION

No interest is served by granting the Petition for Writ of Certiorari. The case law is clear that absent an emergency, some sort of notice and opportunity to be heard

should be allowed before there is a deprivation of a significant property interest. The Court of Appeals' opinion did nothing more than affirm the District Court's denial of a Motion for Summary Judgment where the District Court concluded that a factual dispute existed and that qualified immunity could not be granted without resolution of these issues. If the Petitioners had a reasonable basis for their belief that an emergency existed and immediate closure of the center was required without giving Respondents any sort of pre-deprivation hearing, Petitioners will be entitled to qualified immunity. If, on the other hand, there was no objectively reasonable basis for the director's conclusion that an emergency existed and to close down the Respondent's business without even first advising her of the allegations against her, Petitioners should not have the benefit of qualified immunity.

Petitioners' suggestion that in all instances where the interest of children are alleged, day-care center licenses may be suspended without some sort of pre-deprivation hearing is wholly unsupported in the law and contrary to long cherished principles of due process. For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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No. 90-270

IN THE

Supreme Court of the United States

October Term, 1990

SUSAN BRANDT, *et al.*,

Petitioners,

vs.

CHALKBOARD, INC.; KAREN M. HOYT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Amici Curiae Brief of the States of Alabama, Arkansas, Connecticut, Florida, Hawaii, Idaho, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, South Dakota, Utah, Vermont, Washington, Wyoming, and the Commonwealth of Puerto Rico, The Virgin Islands, and American Samoa as Amici Curiae in Support of Petitioners

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF AMICI

At issue here is the correctness of the Ninth Circuit Court of Appeals' decision denying qualified immunity to Arizona officials. Because the court premised its decision on the finding that officials had followed the wrong state law in suspending a license to operate a day care center, it has introduced a rule of law that was explicitly rejected by this Court in Davis v. Scherer, 468 U.S. 182 (1984). If left undisturbed, not only will the states in the Ninth Circuit be subjected to this discredited rule, but states in other circuits are faced with the potential that Courts of Appeals, may, in their discretion, choose to disregard controlling precedents of this Court, particularly those regarding qualified immunity.

Additionally, the amici states are dismayed at the short shrift given the states' important interest in protecting young children from abuse. The Ninth Circuit's reasoning, which elevates the interests of a business licensee above the vital interest of public health, safety and welfare, creates a dangerous precedent that denigrates this crucial state interest. Its insistence that state officials' decisions regarding public "emergencies" be subjected to an after-the-fact federal court scrutiny on pain of individual monetary liability cannot be reconciled with controlling authority on qualified immunity. Such a result can only inhibit state officials in carrying out their responsibilities under the law and seriously jeopardize public protection.

SUMMARY OF ARGUMENT

In its decision the court of appeals rejected the defense of qualified immunity because Arizona officials failed to follow the appropriate state statute when they took action against a day care center whose employees, the officials believed, had abused children in their care. The officials had decided to follow an administrative law providing for the emergency suspension of a license rather than another that authorized an action for injunctive relief. No Arizona decision had held that such action was impermissible. The decision of the court of appeals squarely conflicts with Davis v. Scherer, 468 U.S. 183 (1984), holding that officials do not lose their qualified immunity merely because they violated a state law.

The decision also conflicts with *Mathews v. Eldridge*, 424 U.S. 319 (1976), because the court of appeals weighed the *Mathews* factors not simply to decide what process was due the day care center but also to arrive at its interpretation of "clearly established law." *Mathews* was not intended for this purpose. Moreover, in conflict with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the court decided that qualified immunity will not protect those officials who should have known their conduct was unlawful. Under *Harlow* and many other decisions of this Court, qualified immunity is not lost because an official "should have known" his conduct was unlawful. It is lost only if clearly established law proscribed the action taken.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISION IN *DAVIS V. SCHERER*.

Due process, this Court has frequently emphasized, "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). Rather, it "is flexible and calls for such procedural protections as the situation demands." *Id.*; *see also, Zinermon v. Burch*, ___ U.S. ___, 110 S.Ct. 975, 984 (1990). For this very reason, the process due an individual, particularly when the state must act in a perceived emergency, is not always clearly apparent. It may be that in retrospect, and applying the intricate balancing tests of *Mathews, supra*, a court will find that a state official's action violated an individual's rights under the Fourteenth Amendment. But such a finding does not decide the issue of entitlement to damages, for

> [e]ven defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard.

Davis v. Scherer, 468 U.S. 183, 190 (1984).

In *Davis v. Scherer*, this Court unequivocally rejected the contention that official conduct in violation of state laws or regulations controlled the due process analysis:

> Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision.

Id. at 194.

The *Davis* case and *Chalkboard, Inc. v. Brandt,* 902 F.2d 1375 (9th Cir. 1989), are virtually identical. Both presented procedural due process challenges to state officials' conduct and both sought monetary damages from state officials. In each case state laws would have provided an opportunity to be heard prior to the deprivation (of employment in *Davis* and a business license in *Chalkboard*). State officials raised the defense of qualified immunity in each case. Thus, *stare decisis* would ordinarily require that the Arizona officials in *Chalkboard* be accorded qualified immunity. Instead, however, the state officials were found subject to liability for failing to follow the correct state law.

The reasons underlying the decision in *Davis v. Scherer*, are of immense importance to the states, for they go to the heart of effective governance. A contrary rule, the Court recognized, "would disrupt the balance that our cases strike between the interests in vindication of citizen's constitutional rights and in public official's effective performance of their duties." 468 U.S. at 195. To accept that any given state statute can define a clearly established constitutional right, perhaps one not otherwise foreshadowed by federal case law, may well require federal courts to decipher the "meaning or purpose" of state laws or regulations, "questions that federal judges often may be unable to resolve on summary judgment." *Id. Davis v. Scherer* clearly prohibited such forays into the thickets of state law. To allow such inquiry into questions of state law would effectively nullify the command that qualified immunity be decided on motion for summary judgment. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

There can be no doubt that the decision of the Ninth Circuit casts to the winds the reasoning of *Davis v. Scherer* and with it the immunity of state officials who were heretofore constrained only to look to clearly established federal law to guide the performance of their duties. As the court of appeals so plainly — and wrongly — stated in its analysis, "[t]he *key element* is that defendants failed to follow the emergency injunction procedures specified by the legislature, and instead effected the summary suspension themselves." *Chalkboard, Inc. v. Brandt*, 902 F.2d 1375, 1381 (9th Cir. 1989) (emphasis added).

Although the Arizona officials had followed another state statute that specifically applied to suspension of licenses, the court of appeals rejected the applicability of that statute even though no Arizona court had ruled on the question. Thus did the court of appeals rest its due process analysis on the "meaning and purpose" of various state statutes, in clear contravention of *Davis v. Scherer* (*see* 468 U.S. at 195):

> In our case . . . the defendants chose not to follow the procedure specified by the legislature. . . .
>
> * * * *
>
> [T]he state itself has specified the kind of emergency treatment required to safeguard the interests of its children. We are not entitled to second-guess that legislative determination [citation omitted] and neither are the defendants.
>
> * * * *
>
> In ignoring these procedures and summarily suspending Chalkboard's license without notice or opportunity to be heard, reasonable officials would have known their actions were not lawful.

Chalkboard, Inc. v. Brandt, 902 F.2d 1375, 1382 (9th Cir. 1989) (emphasis the court's).

The decision below cannot be reconciled with *Davis v. Scherer*. It is inconsistent with the states' settled expectations and the Court's many recent decisions on qualified immunity. But more than consistency is at stake here. The Ninth Circuit's decision, by introducing state law analysis into the due process equation, greatly expands the states' potential for liability. At the very least, it means that lawsuits will be more protracted because they are less amenable to summary judgment when uncertain issues of state law must be explored and resolved. The end result is that in many circumstances state officials will be as much concerned about "harassing litigation," *see Davis v. Scherer*, 468 U.S. 195, as they are about effectively performing their duties. No one benefits, least of all the public, when the chief concern of an official is to avoid making mistakes and to invariably follow the path of least resistance.

II. THE COURT OF APPEAL'S REJECTION OF THE QUALIFIED IMMUNITY DEFENSE MISAPPLIES *MATHEWS V. ELDRIDGE* AND FAILS TO MEET THE OBJECTIVE LEGAL REASONABLENESS STANDARD OF *HARLOW V. FITZGERALD* AND OTHER CASES.

In its effort to decide whether clearly established law foreclosed the qualified immunity defense, the court of appeals misapplied *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *Mathews* provides for weighing the relative interests of the individual and the government in deciding what process is due under the Constitution. *See Zinermon v. Burch*, ___ U.S. ___, 110 S.Ct. 975, 984 (1990); *Ingraham v.*

Wright, 430 U.S. 651, 675 (1977).[1] It does not, however, set forth any formula for determining whether the right to such process has been clearly established.

The analysis of the court of appeals strongly implies that where the weighing of the *Mathews* factors might suggest particular procedural protections, a reasonable official is bound to accept that result as clearly established law, even where there are recent precedents to the contrary.[2] The court of appeals mistakenly applied the *Mathews* analysis to answer the ultimate issue in this case: "Whether the administrative process employed by defendants . . . was *clearly* deficient." 902 F.2d 1380 (emphasis the court's). It concluded that *under the Mathews analysis*, Chalkboard was entitled to a hearing before suspension of its license *and* that reasonable officials would have known this. *Id.* at 1382.

Mathews has never been used by this Court or, so far as can be determined, by any other federal court of appeals as a *formula* to determine whether requisite procedural protections are clearly established law. If such protections are "clearly established," as that term has been used in qualified immunity cases, a complex *Mathews* analysis would be wholly unnecessary. The Ninth Circuit's use of *Mathews* in

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1. The factors to be weighed are:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

2 The court of appeals did not even discuss two cases that clearly support the course of action taken by Arizona officials, *Rice v. Virgil*, 642 F.Supp. 212 (D.N.M. 1986), *aff'd* 854 F.2d 1323 (10th Cir. 1989), and *Dieter v. State Dep't of Social Services*, 228 Neb. 368, 422 N.W.2d 560 (1988).

this fashion cannot be reconciled with the many decisions of this Court on qualified immunity.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court established the principle that officials are protected by qualified immunity if their actions meet the standard of "objective legal reasonableness." It has said subsequently that the defense protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 344-345 (1986). Officials are immune unless "the law clearly proscribed the actions" they took. *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985). That is, "in the light of preexisting law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

The court of appeals clearly misapplied these principles. Using the *Mathews* analysis, the court concluded that a hearing was required before Chalkboard's license could be suspended, relying on both state statutory law and this Court's decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). As shown, reliance on state law plainly violates *Davis v. Scherer, supra*, and the decision attaches no significance whatsoever to the fact that Arizona courts had never decided that the two apparently applicable Arizona statutes were mutually exclusive. Moreover, *Loudermill* involved the discharge of an employee without a prior hearing, not the suspension of a license. The circumstances are not fully analogous, and the decision below cites no case so holding. In fact, *Loudermill* itself notes that "where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay." 470 U.S. at 544-545. The Arizona officials, however, had no comparable alternative for protecting the children at the day care center.

The attitude of the Ninth Circuit toward the protection of children is particularly distressing, minimizing as it does

the importance of their welfare. Millions of young children are now entrusted to the day care centers that have proliferated across the nation in the past two decades. The regulation and control of these businesses is of vital interest to the states. Given the tender age of the children committed to day care, the states must have the ability to protect them by acting quickly in cases of reported abuse. Whenever there is any doubt as to the underlying facts, the doubt must be resolved in favor of acting quickly. After all, the countervailing interest is only financial gain, which scarcely overrides the health, safety and welfare of young children. This important state interest, first enunciated by this Court in *Prince v. Massachusetts*, 321 U.S. 158 (1944), was given very little weight by the Ninth Circuit.

This year the Court has again acknowledged its reluctance to prescribe inflexible rules for situations in which the state must take quick action. In *Zinermon v. Burch*, ___ U.S. ___, 110 S.Ct. 975, 984 (1990), the Court stated that "[a]pplying [the *Mathews*] test, the Court *usually* has held that the Constitution requires some kind of hearing before the State deprives a person of liberty or property." (Emphasis added.) But, the Court acknowledged, that is not invariably so:

> In some circumstances, however, the Court has held that a statutory provision for a postdeprivation hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982) (" 'the necessity of quick action by the State or the impracticality of providing any predeprivation process,' " may mean that a postdeprivation remedy is constitutionally adequate, quoting *Parratt*, 451 U.S. at 539); *Memphis Light*, 436 U.S. at 19 ("where the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the proce-

> dures . . . are sufficiently reliable to minimize the risk of erroneous determination," a prior hearing may not be required); *Ingraham v. Wright*, 430 U.S. 651, 682 (1977) (hearing not required before corporal punishment of junior high school students); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 619-620 (1974) (hearing not required before issuance of writ to sequester debtor's property).

Id. at 984-985.

Here, the Arizona officials reasonably believed that an emergency existed at the day care center and that conditions there threatened the health and safety of young children. There is no clearly established law holding that in such circumstances the day care center's license could not be suspended before a hearing was provided. *Loudermill*, on which the court of appeals relied so heavily, is hardly controlling authority, as this Court expressly stated therein that continued employment of the security guard pending a hearing posed no danger. 470 U.S. 545, n. 10. The same cannot be said of the day care operation here in question.

The decision of the court of appeals is clearly contrary to *Harlow*. "*Harlow* teaches that officials performing discretionary functions are not subject to suit when such questions are resolved against them only after they have acted." *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985). Using the *Mathews* analysis, the court of appeals resolved the novel question of what process was due after the officials acted and improperly held them subject to suit.

The decision below, intertwining as it does both state statutory law and employment law, seems clearly to stand for the proposition that qualified immunity is foreclosed if a court, applying the generalized *Mathews* factors, later finds that an official "should have known" that particular conduct was unlawful, regardless of whether any court had

so held. Indeed, this is how Justice Brennan seems to have interpreted Harlow, supra, 457 U.S. at 821 (Brennan, J., concurring), and it is the apparent rationale of the Ninth Circuit. But the Court's opinion in Harlow relied on the "objective reasonableness" of an official's conduct and explicitly immunized those whose acts violate no "clearly established" prohibitions. Id. at 818. Contrary to the result reached by the Ninth Circuit, this Court has said that only when the law is clearly established and the official pleads "extraordinary circumstances" will immunity turn on whether the official "can prove that he neither knew nor should have known of the relevant legal standard." Id. at 819.

Irrespective of whether the court of appeals was right in its determination of what process was due, it was wrong in deciding that reasonable officers "would have known" their emergency actions were unlawful and using that as the standard for clearly established law. The court's rejection of the qualified immunity defense, and its strained analytical approach, must give pause to all public officials. Few, at least in the Ninth Circuit, will be wont to act "with independence and without fear of consequences," *see Harlow, supra*, at 819 quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967), if the law is *not* clearly established. That result turns *Harlow* on its head.

CONCLUSION

For all the foregoing reasons, amici respectfully submit that the Court should either summarily reverse the decision below or grant the writ and set the case for argument on its merits.

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